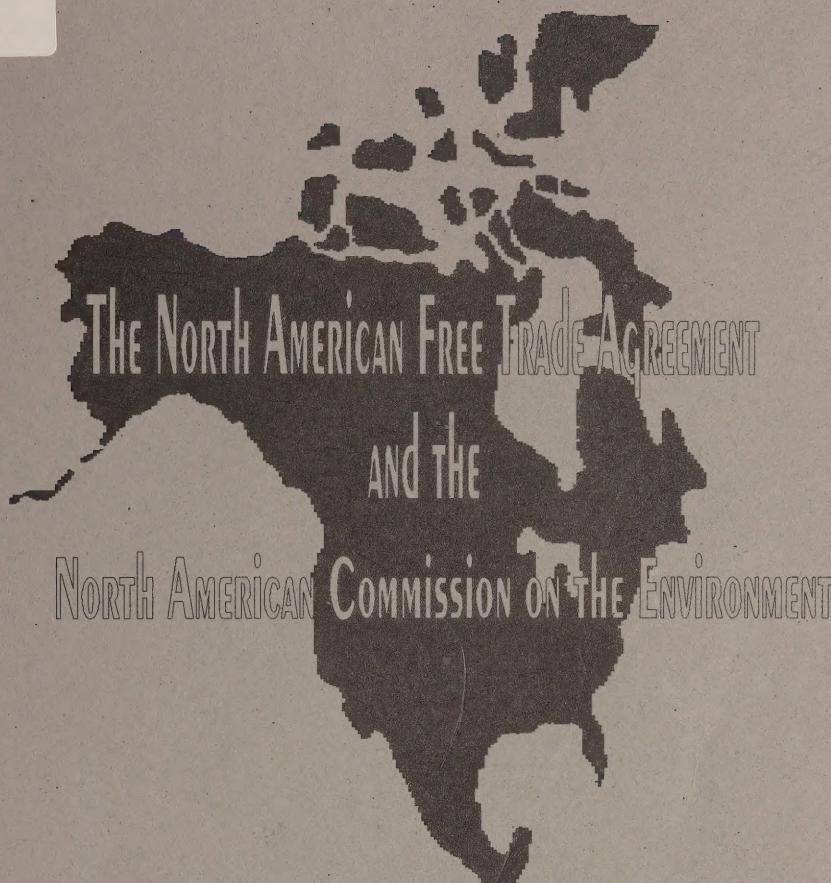


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**THE NORTH AMERICAN FREE TRADE AGREEMENT
AND THE
NORTH AMERICAN COMMISSION ON THE ENVIRONMENT**

Edited by:

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ENVIRONMENT AND THE ECONOMY

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INTRODUCTION

In September, 1992, the Canadian, Mexican and American governments concluded negotiations for a North American Free Trade Agreement (NAFTA). While NAFTA was heralded as the "greenest" trade agreement in history, some environmentalists are not convinced that it will live up to its billing. To this end, a commitment has been obtained by the leaders of the three countries to create a new international institution named the North American Commission on the Environment (NACE). This institution would coordinate environmental protection efforts in the three countries, monitor the effects of a NAFTA on the environment and also assist in the operation of NAFTA where it relates to the environment.

On December 7, 1992, the National Round Table on the Environment and the Economy and the Ontario Round Table on Environment and Economy co-sponsored a one-day workshop in Ottawa co-chaired by Pierre Marc Johnson (NRTEE) and David Runnalls (ORTEE). The workshop was organized in response to a shared belief that NACE was sufficiently important to citizens throughout North America to warrant detailed scrutiny and dialogue with all the relevant stakeholders at this early stage of the intergovernmental negotiations. Among the participants at the workshop were senior Canadian government officials, academics, NGOs and representatives from business, and prominent Americans involved in the study of NAFTA and the environment. A list of participants can be found in Appendix A.

The agenda for the workshop was designed to address some of the important questions that have arisen surrounding the NAFTA and the idea of the NACE. These questions are outlined in the Background Paper prepared by John Kirton and Sarah Richardson, which, together with the agenda, is attached as Appendix B. Critical

issues for discussion included the current status of the idea of the concept of a NACE, the components of NAFTA where a NACE might be useful, and the design of the NACE itself. The results of the day's presentations and discussions more than lived up to the expectations of the organizers and prompted the proceedings to be reproduced in the form of this Report so that they might be made available to a wider audience. This Report is based on the presentations of speakers and the questions and comments shared around the table. Where appropriate, speakers' comments following their presentations have been incorporated into their texts.

In Chapter One Janine Ferretti, Executive Director of Pollution Probe, presents a brief introduction to the NACE proposal. Ferretti outlined clearly the key issues for discussion: a NACE's relationship to NAFTA in areas such as dispute resolution; the functions of a NACE including issues such as its power to monitor and enforce; and the design of a NACE in terms of its mandate, membership, and relationship to the public.

Chapter Two provides a brief introduction of the American NGOs' attitudes towards a NACE and is written by Stewart Hudson, of the National Wildlife Federation. The NWF is the largest NGO in the U.S. and has been extraordinarily active and influential in this area over the last few years.

Regrettably, Manuel Guerra, a leading environmentalist from Mexico, was unable to attend the workshop at the last minute due to personal reasons. Stewart Hudson generously agreed to provide his perception of the Mexican NGO position on NACE. His views appear as part of Chapter Nine.

Chapter Three is contributed by Armand de Mestral, law professor at McGill University and member of the Chapter 18 roster of panellists under the Dispute Settlement Mechanism of the Canada-U.S. Free Trade

Agreement. M. de Mestral provides an assessment of the Canada-U.S. dispute settlement mechanism and its environmental record. In so doing, he outlines various ways in which a NACE could add elements of environmentalism into the process and an emphasis on the dispute settlement procedure and flexibility in the roster of panellists. Among other things, M. de Mestral discusses a potential role for NACE as a consultative body, as a body that could be used to identify issues involved in dispute and to form expert panels to aid in dispute resolution. He further suggests that, at a minimum, NACE could provide a roster of potential "environmental panellists" for dispute resolution in cases involving the environment, and perhaps even establish itself as a Commission with the exclusive jurisdiction for settling environmental disputes. In the longer term, a NACE might be used as a forum to undertake the creation of common rule-making and harmonization of environmental rules between the three parties.

Chapter Four is written by Robert Page, Dean of Environmental Design at the University of Calgary, member of the NRTEE, and former head of the Canadian Environmental Advisory Council. As the environmental representative on Canada's International Trade Advisory Committee, Dr. Page was also intimately involved in the NAFTA negotiations. Dr. Page provides a close look at the Canadian process of dealing with environmental issues throughout the negotiations. He also outlines a number of substantive areas which had triggered controversy in the NAFTA negotiations. Among other things, he identifies a possible role for NACE in clarifying environmental exemptions under NAFTA, monitoring standards and enforcement among the three parties, developing scientific review boards and scientific standards to assist in dispute resolution and, more broadly, serving as a multistakeholder institution providing

public participation in the evolution and implementation of NAFTA.

Chapter Five considers the relationship between NAFTA and a NACE. Here Stewart Hudson outlines seven areas where the linkages between NAFTA and NACE could be forged and strengthened. In particular, he identifies a role for NACE in implementing existing environmental provisions of NAFTA and in providing expertise in the dispute settlement mechanism and the negotiation of supplemental agreements. He emphasizes the need to view NAFTA and NACE as separate entities and assesses the desirability of alternative institutional arrangements. Mr. Hudson identifies an important role for NACE to act as a counter-balance to the North American Free Trade Commission which comprises the trade ministers of the parties. To this end, he suggests that a NACE should include the environment ministers of the three countries in its membership, but that should not preclude the participation of the NGO community in the process.

Chapter Six addresses issues surrounding the design of NACE. Paul Muldoon, Counsel for Pollution Probe, focuses on the International Joint Commission (IJC) as a model for NACE. Mr. Muldoon outlines lessons that can be taken out of the experience of the IJC. These lessons include the importance of the substantive mandate and the rules to the institution designed to oversee them; the importance of the non-legal elements of the institution to its relevancy; the institution's political accountability; the importance of public participation; and the importance of the role of sub-nationals in this process. These lessons point to the fundamental need for environmental accountability to be built firmly into the process and not taken for granted.

In Chapter Seven Jean Hennessey, a former U.S. Commissioner of the IJC and now Director of the Institute on Canada and the United States at Dartmouth College in New Hampshire, considers in detail the structure of a NACE. Ms. Hennessey offers an organizational outline. In order to address the issue of accountability, she stressed the importance of visibility and suggests the idea of a NAFTA-NACE summit to be held either bi-annually or annually to present reports on the state of the environment, trade, and to include financial reports. She suggests that both NAFTA and NACE could have stand-alone agendas. NACE, however, should not take on the role of either regulator or enforcer. In addition, there could also be a shared agenda which might include substantive issues such as questions of subsidies, full-cost pricing and tradeable permits. Procedurally, there could be overlap in areas such as dispute settlement and possibly the process of harmonization of standards. Ms. Hennessey was of the view that ministers are too political to be involved in a NACE and preferred the independent model provided by IJC Commissioners.

In Chapter Eight Ronald Doering, now serving as Executive Director of the National Round Table on the Environment and the Economy identifies areas of consensus from the discussion and areas for further research. Mr. Doering's comments reflect his summation of the day's events as presented at the close of the workshop.

In order to contribute to the ongoing consideration of the issues, in Chapter Nine Sarah Richardson presents some of the interesting observations, comments, and questions arising out of the workshop which were not necessarily raised in the individual chapters of this Report. Nothing in this Report should be taken as reflecting the views of either the National Round Table on the Environment and the Economy or the Ontario Round Table on Environment and Economy.

1. THE NACE PROPOSAL: A CANADIAN ENVIRONMENTAL PERSPECTIVE

Janine Ferretti

On September 17th 1992, the Environment Ministers from Canada, the U.S. and Mexico met in Washington D.C. and announced their commitment to create a North American Commission on the Environment (NACE). Preliminary negotiations were held on October 22nd and a second meeting of the negotiators was scheduled for the 15th-16th of December, 1992.

The idea behind NACE is not just to facilitate environmental cooperation, but also to address trade-related issues arising out of NAFTA. There are a variety of views of the NACE and its role, but some of the key issues of concern are its relationship with the NAFTA and the North American Free Trade Commission under the NAFTA, in terms of functions such as monitoring and reporting on development of environmental standards, and dispute settlement. Other key issues include enforcement and regulatory power, establishing minimal

environmental standards, membership, the role of public, secretariat, and the terms of reference; should NACE only address tri-lateral issues or is there room for the commission to address bilateral issues that clearly impact on the entire North American environment?

Finally, a fundamental question is how NACE should work with existing international institutions such as the IJC and the most-recently established Mexico-U.S. Bilateral Environmental Commission. The terms of reference were to be finalized at a meeting in Mexico in January 1993; this was delayed. The prevailing view in the environmental community is that the NACE should not necessarily wait until the NAFTA has been passed by all three countries.

2. THE NACE PROPOSAL: AN AMERICAN ENVIRONMENTAL PERSPECTIVE

Stewart Hudson

The National Wildlife Federation (NWF) is the only NGO in the U.S. that has endorsed the NAFTA environmental provisions. Other American NGOs are more critical of the NAFTA and more vehement in their support for a strong North American Commission on the Environment. Although there are differing points of view on what a NACE ought to be, there is widespread support within the environmental community in the U.S. for the Commission. In fact, four different organizations have claimed credit for the idea.

One factor that is critically important in the lead up to a NACE is that a new President took office in the U.S. on January 20th, 1993. In a speech on October 4th, 1992 at New York State University, then presidential-candidate Bill Clinton outlined his position on the North American Commission. As often happens during campaigns, however, the position taken indicated that though there is a difference between Clinton and then President Bush, it is not clear what that difference is. However, the direction is positive in that President Clinton will support a strong North American Commission, not one watered down to the U.S. position of the Bush Administration. The NWF endorsed the NAFTA based partly on a U.S. government commitment to a NACE that would deal not only with cooperative

measures on environment, but also with the trade and environment linkage in North America.

Three documents have been attached to this Report as Appendix C. The first document is a Press Release announcing NWF support for the NAFTA environmental provisions. The second document is a two-page description of what the U.S. government has committed to do on the NACE and outlining its proposed functions. The third document is a letter from Ambassador Carla Hills to Jay Hair, President of the NWF. While NGO groups in the U.S. are not privy to the NACE negotiations, the letter confirms their understanding that the role of a NACE will go beyond facilitating environmental cooperation and will include a mandate to deal with trade issues. This trade role is likely to get stronger with the Clinton Administration.

The establishment of a NACE is an opportunity that goes beyond the trade agreement. Many groups in the U.S., despite their views on the NAFTA and the environment, will seek to make the best use of this opportunity. There is a strong view that NACE should continue to establish itself regardless of the NAFTA. This separation of NAFTA and a NACE is important.

3. THE CUFTA DISPUTE SETTLEMENT MECHANISM AND THE ENVIRONMENT: A Review Of The Record

Armand de Mestral

Before beginning an assessment of free trade agreements it is critical to determine what the policy purposes and the goals of those agreements are. For example, maintaining the freedom to manoeuvre at home is very different from creating one system that will set the agenda both at home and abroad. In defining a goal, there are a number of elements that must be considered. Is the goal to change domestic policy, coordinate domestic policy, harmonize, equalize or make domestic policies identical? Is the goal to establish a system encompassing the mutual recognition of standards or is the goal merely to remove barriers? Positive integration of standards and policies and the creation of new institutions to accompany that goal, goes a lot further than the removal of barriers at the border. Consequently, integration is easier to envisage in the context of a Common Market or Federation than it is in the context of the GATT or the Canada-U.S. Free Trade Agreement (CUFTA).

In assessing the NAFTA, therefore, there needs to be some clarification what an agreement of this type can be expected to do. In doing so, one must distinguish between free trade, customs union, Common Market, Federal system and unitary state. The degree of economic integration and rule-making coordination anticipated under NAFTA must be clarified in order to identify a helpful role for a NACE. How does one envisage the NAFTA working and how will the NACE be involved? It is important that a NACE be conceived to be capable of acting in parallel and closely with the NAFTA as it currently exists because presumably NAFTA is not going to be changed radically.

The CUFTA and the GATT have historically dealt with negative techniques of negative integration (i.e., removal of trade barriers). Over the last five years the GATT has been forced into new areas like services, investment, and intellectual property. The CUFTA has also reflected a movement beyond the simple removal of barriers. The NAFTA will go a step beyond the CUFTA, especially in the areas of investment and financial services. At the same time as the GATT and the CUFTA have been challenged to expand and cover more, the environmental dimension has been raised in both contexts as well, although less explicitly under the CUFTA. There is no doubt that the environment is now also on the agenda. There are explicit provisions in NAFTA which address environmental concerns. Whether they are adequate or not, the environmental dimension is now on the table and is one of the issues which must be dealt with up front in the NAFTA context.

The question is, can NAFTA handle these issues and to what extent? Can they be handled in a manner that moves environmental and trade considerations in the same direction and deals with them in a compatible fashion, or is the relationship between the two concerns going to be highly antagonistic? In the GATT there has been more than one dispute involving environmental issues, and under the CUFTA there have been two cases that involved resource management where environmental concerns were considered. The five panellists in the CUFTA disputes tried to respond to the environmental concerns but the Agreement has very little formal language that deals with environment, nor does it contain any particular mandate with respect to environment.

There are some formal provisions in NAFTA which deal with environmental questions. For example, NAFTA has provisions built into it which give primacy to several international conventions of an environmental character. Similarly under the general dispute settlement provisions (Chapter 20), the NAFTA provides for the possibility of one party insisting on NAFTA dispute settlement process rather than GATT dispute settlement in cases that involve environmental issues. Presumably this provision rests on the assumption that in some of those cases the NAFTA context is likely to be more sympathetic and more responsive to the environmental dimension than the GATT context. Whether that assumption is fair or not is debatable. The GATT is certainly making attempts to become much more sensitive to the environmental dimension. A major committee has been established although it has not produced any work that has been made public and there is widespread consensus that the next major negotiations for the GATT following the Uruguay Round will be dominated by environmental concerns. Therefore, the GATT has yet to show itself incapable of responding to the challenges posed by the environmental dimension to trade.

The perception of NAFTA as a potential defender of the environment, at least in comparison to the GATT, begs the question of whether the link can be made closer between a NACE and the NAFTA dispute settlement process? It is worth thinking in terms of possible linkages in three areas: consultation, the formal dispute settlement area and environmental policy making or harmonization.

General Consultation Provisions. Consultation is an obligation that runs right through the North American Free Trade Commission. Consultative bodies are created through NAFTA to implement consultation and the agreement will supposedly be carried forward and

developed in many areas by institutional practices. That is one of the objectives envisaged.

It would be relatively easy to broaden and deepen the consultation requirements of consultative bodies set up under NAFTA in a NACE. Indeed, either by way of practice, or perhaps through a more formal mechanism, a NACE might be given a role as a consultative body on selected issues. Not only could the NACE be available for consultation, but it might also provide input to the technical bodies. Discussion of certain issues by NAFTA consultative bodies could be replaced by discussion in a NACE itself. For example, for certain purposes the forum for the discussion of certain environmental questions and consultation could be directed to the NACE and whatever bodies it chooses to create. The results from those discussions could then be fed right back into a NAFTA context. There is room to explore, expand, and clarify a consultative role for a NACE.

Formal Dispute Settlement Procedure.

There is also room for expansion in the dispute settlement procedure under NAFTA, without altering the formal text of the agreement. For instance, Chapter 20, the General Dispute Settlement Provisions, call for consultations in certain contexts. In some cases, consultations dealing with certain issues can take place under specialized committees rather than under the dispute settlement consultation process. There are cross references in several chapters which indicate that the consultations that take place under those chapters which lead to decisions that a dispute exists, will feed directly into the general dispute settlement chapters of NAFTA. Consultations could take place on certain issues in a NACE and if the decision was made that a dispute existed, the issue could be formulated within the NACE discussion. The dispute could then be channelled back into Chapter 20 and a panel would be formed.

The roster of panellists is another area where change could occur without changing the text of NAFTA. There should be a roster of a number of panellists from which issue-specific panellists could be drawn. Up until recently, the GATT has tended to draw on trade policy experts as panel members but it is now becoming more common to bring in panellists with a particular expertise. It would appear that this can only enrich the panel.

Similarly, there are provisions in Chapter 20 allowing for (not requiring) the constitution of expert groups to advise and lend expert opinion to the dispute settlement panel. There is no reason that there could not be a close relationship between a NACE and the NAFTA process in the formation of expert groups. A NACE itself could form those panels and provide the expert advice. This could be built right into the NAFTA without changing the text of the agreement. There is room to integrate the work of a NACE, the expertise, and the settlement of disputes as now dealt with.

There is no provision that would allow intervention by expert groups if it was not requested by one of the parties. One way of guaranteeing the expert intervention is to have one of the parties to NAFTA introduce the views of NACE as part of their evidence in a dispute. Apart from that, there does not appear to be any formal mechanism for including the views of an expert committee formed under NACE in NAFTA disputes, as part of a consultative process in dispute resolution, without changing the text of NAFTA. One option might be to negotiate a parallel agreement which would stipulate that NACE would always be consulted and its opinions would always be read by the parties to the dispute. As such, this agreement would become part of the commitments between Canada, Mexico and the United States.

Alternatively, given the fact that a NACE will be an interstate agreement, with a budget and the capacity to develop and credibly provide expertise, a process might be created whereby their advice will be sought out. If one were to impose upon the parties a duty to consult a NACE, this could be characterized as amending NAFTA, albeit very slightly. However, if NACE is characterized as an institution that is able to provide credible expert advice in disputes of an environmental character, NACE might be invited to form an expert panel and give advice on the issue. By sufficiently specifying both the resources of the NACE and its mandate, one could make it necessary for the dispute settlement process to incorporate whatever expertise NACE could offer.

This might even lead to a NACE that develops exclusive expertise in the settlement of environment-related trade disputes. There is a precedent for this in Chapter 14 and dispute settlement of issues related to financial investment and services. Dispute settlement under Chapter 14 is managed by a Financial Services Commission which in essence is the Canadian Department of Finance, the U.S. Treasury and their Mexican counterpart. This Commission has a roster of 15 panellists, over and above the NAFTA roster of 25 panellists. If finance is so important that it has to be left to the financiers, perhaps environment is important enough to be left to environmentalists. Although that precedent is built formally into the text, environmentalists could be named to the ordinary roster, or a NACE could put forward its own roster of eminent environmentalists willing to assist in resolving disputes that arise and a practice could develop.

There is also room for alternative dispute resolution under NAFTA as it now exists. Article 2022 refers to alternative dispute resolution or arbitration so that in certain cases environmental disputes could be resolved by a different process than that envisaged in Chapter 20. Without changing Chapter 20 an environmental dimension could be built in to ensure that people with environmental expertise are part of the dispute settlement process. This does not involve going so far as to set up the NACE as an environmental body with genuine interstate authority over environmental disputes, which is another option depending upon how far one is prepared to go.

Rule-making and Harmonization. When approaching the GATT, the CUFTA, or NAFTA in a manner sensitive to the environmental dimension, a step is taken towards greater integration not only of the environment with the economy but also with the political rule-making systems. NAFTA is increasing the density and coverage of free trade. Canada should move in the same direction. The world is moving towards greater economic integration and adding on the environment and labour standards results in a closer, economic, social, and political community that reflects the current global reality. Over the long term, this is the ultimate goal the NACE should aim at. Possibly in the near future, the Commission

will have to be recast, for example, by having not three or five but ten or fifteen members to create a much more cohesive institution. The secretariat provided for under Chapter 20 is already something of a development over the CUFTA's secretariat (essentially a little office in Ottawa and a little office in Washington). There is the potential for a common secretariat in Chapter 20 which could offer greater coordination and action.

At this point, except through formal negotiation or standard-making through various specialized consultative bodies provided for in certain chapters, of NAFTA, there is no mechanism for the harmonization of environmental rules. While this may be the longer-term goal, it is the logical consequence of stating that NAFTA must be responsive to environmental dimensions.

4. NEGOTIATING THE ENVIRONMENTAL PROVISIONS OF NAFTA: WHAT GAINS WERE MADE?

Robert Page

It is useful to divide a commentary on the Canadian process of assessing the environmental implications of the NAFTA into two broad sections. The first section will consider some of the process issues that were involved on the Canadian side. The second section will look at some of the actual environmental issues as they emerged in some of the discussions between industry, NGOs, and government in Ottawa. An outline of the issues to be considered is attached to this Report as Appendix C.

PROCESS

The first thing to emphasize in connection with the Canadian process is that during the Canada-U.S. Free Trade negotiations, there was no acknowledgement of the environment. For this the Canadian government and Tom McMillan, the Environment Minister at the time received considerable criticism in public. The Minister did ask his advisory council to prepare a generic paper on free trade and the environment which was produced prior to the CUFTA. That paper was fed into the Cabinet process but there is no evidence that it played any role in Cabinet's deliberations on the Agreement.

Secondly, as background to the Canadian situation was the development of the new Environmental Assessment and Review Process Legislation between 1990 and 1992. The new EARP was important in that it transferred the concept of environmental assessment from projects to the wider area of policies and programs. NAFTA was one of the first policies to be subject to this new

policy assessment. As such NAFTA was testing the waters and also raising a whole series of questions for not only international trade but for a variety of other government departments, some of which were leery as to what this process might entail. For the internal operations of the Canadian Government, the issue was not only the specifics of environmental review of NAFTA, but how this action could become a precedent for environmental reviews of all new policy initiatives by the federal government. Needless to say there was a resistance to a comprehensive and public review process.

When the Canadian Government came to consider this issue, the American environmental review of NAFTA was already well underway. In Washington the Office of the U.S. Trade Representative had produced a draft document of about 200 pages; public consultation hearings were held in some six major cities; and then the document was finalized for presentation to the Government. This public consultation route was rejected in Ottawa in favour of another model. An inter-departmental committee was struck to prepare the review and selected individuals were approached for input. The process was heavily criticized in the NGO community. But given the sensitivity about creating a government-wide precedent, there was strong opposition to a formal public consultation process. This was to be an environmental review not an environmental impact assessment.

The initial assumption of the Department of External Affairs was that the major part of public consultation would take place through the ITAC and the SAGITs. ITAC is the International Trade Advisory Committee to the federal minister and is primarily made up of CEOs of major exporting companies. The SAGITs are sectoral advisory committees in the forestry, fisheries and various other industry groups. There is a history of public consultation with regard to trade matters which has taken place over a number of years through this format. The Minister of the Environment in Canada, Jean Charest, had assumed originally that the Canadian Environmental Advisory Council would play some co-ordinating role with the NGO community. Unfortunately, the February 1992 budget eliminated that organization so that option was not available. And the issue then quickly became, to what extent would the public consultation with regard to the negotiating process for NAFTA be a very restrictive one through ITAC and the SAGITs, or would it be a more open one with regard to involving a variety of other parties and through the whole process. There was on-going pressure especially through the NGO community in Canada to try and open up the process of the environment and NAFTA and some concern from within government to doing that.

Whenever the government was challenged in Canada with regard to either the openness of the process or the comprehensiveness of the environmental review then there was reference back to the parallel process including a NACE that would more directly deal with environmental concerns. The NGO community was very concerned that this has a hiving-off process, pushing into a separate unrelated process the main environmental issues so that the trade negotiations could go ahead without being

hindered by environmental baggage. And at the same time, the government argued that many of the environmental issues that were being raised could not adequately be dealt with in a trade format.

In Canada, in order to conduct the environmental review, an interdepartmental Review Committee was formed with quite wide representation from External Affairs/International Trade, Energy Mines and Resources, Department of the Environment, Finance, Fisheries and Oceans, Forestry, Industry Science and Technology, and Transport. External Affairs played a critical role liaising from the Committee to the various stakeholders interested in the process, actively seeking out ENGO and other opinion to broaden the input for the Review. In addition to the formal committee there was a technical and scientific advisory body which had been put together by Environment Canada. Through late 1991 and the first eight months of 1992, the Review Committee, linked directly to ITAC and to the SAGITs went through a series of drafts on the environmental implications of NAFTA. There were discussions with provincial governments with regard to the negotiations and there were a few invited NGOs who participated in workshops.

The Review Committee had a dual mandate. First it had responsibility to advise the negotiators on the environmental implications of the various options being considered at the negotiating table. Secondly the Review Committee had to produce an environmental review of NAFTA to be considered by Cabinet along with the final trade agreement.

Confidentiality in the process and with the final report was a constant issue. During the process ITAC and SAGIT members had

access to the review document but not NGO representatives in general. External Affairs argued that the production of a Privy Council document required secrecy which was a condition of serving on ITAC and SAGITs. Initially it was assumed that this final review document would not be made public but only a summary of it. After pressure from the environmental representatives on ITAC and the SAGITs the final report was released in its entirety to the relief of many of the officials who had worked on it and wanted their efforts to be in the public arena. While the final report fell short of the hopes of the NGOs it did cover substantial analysis of the environmental impacts of NAFTA on Canada which was the focus of its mandate.

ISSUES

In the debate in Canada, a number of issues emerged in the public discussions.

1. The Principle of Free Trade. For some environmental groups the issue was one of the principle of free trade. They believed that the basic concept of free trade would lead to further deregulation in the environmental field, a lowering of environmental standards, and harmonization to the lowest common denominator. Not only would Mexico be a pollution haven but competitive pressures would erode Canadian standards. Therefore free trade in principle would hurt the environment.

2. Unilateralism. Secondly was the issue of unilateralism. Did Canada have the right to challenge environmental standards in the U.S and Mexico? Most NGOs wanted Canada to take such a position where Government was very hesitant because this approach opened the way for the U.S. to claim similar rights over Canadian practice. The Canadian policy had been to seek multilateral agreements and then exert

pressure such as with the Law of the Sea negotiations to support our arctic environmental regulations. Some NGO representatives argued that normal diplomatic channels had failed and exceptional measures were necessary for protection of the global commons.

3. Sustainable Development. Sustainable development was a further issue especially in the light of the discussions at the United Nations Conference on Environment and Development (UNCED). While there were references in the preamble and the text to sustainable development, it was not entrenched as a basic principle of operation. Of the three countries involved, Canada was the most committed to this principle. The Bush Administration's was suspicious of its inclusion.

4. International Conventions. Another issue involved the status of international conventions like Biodiversity, Climate Change and the Montreal Protocol on Ozone Depleting Substances. In the NAFTA there was recognition that existing international environmental agreements would take precedence over the NAFTA. However, the trade sanction provisions in the Montreal Protocol remain an area of controversy for there exist arguments that those provisions are not in compliance with GATT.

5. Environmental Standards. Under NAFTA, Canada or any other party can exclude the importation of goods or services which do not meet Canadian or other standards. This includes marking and labelling, not just the product itself. But, the exclusive standards must be consistent with those applied to domestic producers and cannot constitute an unnecessary obstacle to legitimate trade (disguised protectionism). The standards must also reflect the need to protect human or plant life, help the environment or consumers, or promote sustainable development. This is where

issues of the dispute settlement may come into play.

NAFTA's treatment of standards extends GATT rules by attempting to entrench the issue. The clear intention of Canadian negotiators was to achieve the right to adopt higher environmental standards than their trading partners, or even international standards.

6. Environmental Enforcement. One of the related areas that created great controversy in Canada, the U.S. and Mexico was the issue of enforcement. Given the history of enforcement in some Canadian provinces, some American states and in Mexico, this was a natural area of concern especially for the NGO community. Under NAFTA, products not meeting local environmental standards can be excluded. This includes not only the product itself, but the processes and production methods which may be involved. But under the NAFTA provisions for sovereignty, there is no direct means for Canada to monitor what may be happening in the U.S. or Mexico although this information can be requested. However, some jurisdictions in North America do not yet possess the personnel or financial resources to gather the information necessary to comply with such requests. Moreover, monitoring environmental standards through imports entering Canada at the border will be a very difficult task, especially under open border provisions of free trade. The whole issue of monitoring standards and monitoring enforcement is a very important one and should be considered in connection with a NACE.

7. Dispute Settlement Mechanism. There are some very important issues related to the environment and dispute settlement mechanisms. For example, there is a disturbing level of ambiguity evident in this area including the degree to which the use of

a scientific review board is optional rather than mandatory. There can be in addition to that, a role for NACE in connection with developing some of those scientific standards.

8. Investment. There was considerable discussion in Canada on the issue of investment where environmental standards are lower. Under NAFTA there can be no deliberate lowering of environmental standards to attract investment.

9. Public Information, Awareness and Accountability. NAFTA includes provisions for consultation, information sharing and monitoring between the three parties and for emergency warning of environmental danger or environmental accidents.

10. Subsidies. Subsidies were not addressed during the negotiations but were referenced only to the further discussion in the GATT. This is an enormously important area both with the potential for disputes in the area of the environment. A related issue is the countervail. In Canada there was argument that countervail should be available in order that there be a level economic playing field in instances where environmental standards were lower in one jurisdiction than in another. This argument was rejected by several parties and was not written into the NAFTA.

11. Environmental Scope. When the Canadian government began deliberations for the Canadian document on the environmental impacts of NAFTA, they encountered considerable challenges. The methodology and even the data on some of the areas of environmental impacts was limited and some of the scientific literature was not easily adaptable and applicable to the specifics of trade. As a result of this, the Canadian document, to an even greater

extent than the American document is a qualitative rather than a quantitative assessment of the factors. Canadian exports to Mexico are a relatively small percentage of overall exports, about .4%, and Mexico accounts for only 2% of our total imports. Therefore, the overall environmental impact with regard to Canadian production with the exception of two or three industries was viewed in this document to be modest. The scope of the environmental review of NAFTA was more limited than the EPA document but was more than the Canadian government originally intended.

12. Long-Range Transport of Airborne Pollutants. There were a few specific issues which aroused some controversy and some debate. The long-range transport of airborne pollution was a very interesting one in the sense that over the last five years international data has begun to emerge, not only on common airborne pollutants like SO₂, but on persistent pollutants such as organo-chlorines, PCBs and pesticides. There has been growing scientific evidence that in long distances airborne travel these pollutants were not being flushed out by rainfall. This could mean, for instance, that organo-chlorines from Mexico were travelling all the way into the Great Lakes Basin. There is some scientific evidence that these pollutants might even be making their way into the Arctic food chain. This is of some interest and some importance. The tracking mechanisms are difficult, but it is nonetheless an area where the NAFTA negotiations gave some pointed focus and stimulus to trying to work out some of these in a wider public policy sense. In addition to that, the fact that landfill sites in some jurisdictions are still being burnt and that there are inadequate inventories on what is going into some of those landfill sites, can mean that direct emissions are released into the atmosphere in a way that could have

significant transborder implications, especially between the United States and Mexico.

13. Water Exports. One area of specific concern to Canada and the Canadian NGO debate was the water exports question. While this was not raised in the NAFTA negotiations by any of the three parties, it was a matter of public debate in Canada. There is concern that water shortages in the southwestern United States and in Mexico especially if it undergoes the degree of economic development that some have assumed, could lead to acute political pressures on Canada for large-scale water diversion or water exports. Currently this does not make economic sense but it is a lingering fear in Canada. Enabling NAFTA legislation will probably include a specific provision reinforcing the existing Canadian policy on water exports.

14. Wildlife Habitat. There was also concern with regard to wildlife habitat and protected species in the NAFTA debate which led to some interesting discussion. This was particularly true for species that migrate between the three countries (for example, whales, birds, and butterflies) where habitat in Mexico directly affects the viability of species which spend part of their lifecycle in Canada.

15. Migration of Polluting Industries. A final controversial issue for Canada in the NAFTA negotiations was that surrounding the migration of polluting industries. The Canadian document spent considerable time trying to argue that the economic incentives for Canadian companies to migrate to Mexico in order to achieve lower environmental standards or lower levels of enforcement were not adequate and that such migration did not make economic sense. This may be a general pattern, but the

question was raised in Canada as to whether or not there might be exceptions to this. The EPA document included some analysis on that point and concluded that labour costs would be a more significant cost than environmental costs if companies were to relocate. Moreover, the EPA concluded that any company relocating had to take into account a rising level of enforcement in Mexico of the 1988 environmental law which is aimed most vigorously at new companies as opposed to existing ones.

The experience of Canada and the Canadian government in connection with the environmental review of NAFTA is a very important first step in coming to grips with the incredibly complex issues of environment and trade. But it is only the first step in this country. In terms of the process issues, one needs to pay tribute to those who are trying to develop a new process. But it is a process which needs further elaboration with the implementation of NAFTA. A NACE would provide opportunities for public participation in the evolution and implementation of NAFTA, not just in terms of factual input.

Finally, there is immense scope remaining for NACE in terms of the fact that no one is

doing this adequately as yet in the world. There is no body of literature to fall back on and no body of experience to fall back on. Yet there are a variety of ways in which the information base, methodology, and the relevance of science to trade policy requires a great deal of future work. Whether it is in the implementation of NAFTA or whether it is in Canada's contribution as North Americans to the development of OECD or GATT negotiations, there is a tremendous role here. A ministerial council would in no way achieve some of these broader goals. A multi-stakeholder council in which industry, NGO, and universities can effectively contribute to the development of this field would be extremely useful.

5. THE NAFTA-NACE RELATIONSHIP

Stewart Hudson

The National Wildlife Federation is one of the few NGOs in the U.S. to have endorsed the environmental provisions of NAFTA. However, the prevailing support for these provisions is based upon a package that extends well beyond the NAFTA text. Additional considerations include Congressional implementing legislation of NAFTA, supplemental environmental agreements that President Clinton has committed himself to, and the prospective North American Commission on the Environment (NACE) which can take on much of the work that might have been left undone. In considering a NACE, the question is no longer *if* the Commission will exist, but *what* the Commission will look like.

From a historical perspective, the idea behind a NACE stems in part from the European experience in the formation of its Common Market. Although North America has not yet reached the stage of a common market, economic integration at all levels inevitably has social and environmental consequences which challenge existing institutions and create the need for new ones. Because of the scope of environmental issues brought up by NAFTA, there is a need for a political institution such as a NACE at the outset to deal with the environment.

The NACE has also been strongly supported by groups in Canada, the U.S. and Mexico, as a prospective counterweight to the North American Free Trade Commission in the dispute resolution procedure. Some rulings of GATT panels have indicated a need for greater expertise in the Panels themselves and seem to reflect the inevitable bias introduced into a panel as a result of the nature and composition of the institution; the main charge of the GATT is to govern trade rules, not to protect the environment.

Finally, there is a need for an institution that can promote cooperative environmental ventures on either a bilateral or trilateral basis. Recent cases have highlighted a perceived danger in so-called unilateral measures in the international trade context. This has led to calls for international environmental agreements. However, one does not often hear members of the trade community coming out in support of those agreements. The NACE provides another opportunity to promote cooperative environmental measures that may or may not relate to trade but that can assist the trade and environment communities avoid conflict. There are seven possible ways that the NACE could relate to the NAFTA:

Implementing the environmental provisions that exist in the NAFTA now. Article 2001 puts the North American Free Trade Commission in charge of the supervision of the implementation of NAFTA. A NACE could have a role in the environmental supervision of the implementation of NAFTA. For example, the NAFTA commits countries to an upward harmonization of standards and the North American Commission could help facilitate this.

Article 913 of the NAFTA suggests that the three parties must commit themselves to attempt the enforcement of environmental standards. There is no trade remedy or discipline associated with that; it is another role that the NACE could play. Article 104 deals with international environmental agreements; three are listed, but others may be added in the future. The NACE should be involved in that process. Article 1114 deals with the creation of pollution havens and policies that might lead to the creation of such havens. While it does not require countries to do anything, it certainly discourages the NAFTA parties and works

to prevent the creation of pollution havens. There is a role for the NACE in collecting information and participating in the consultative mechanisms that are called for under that provision.

Finally, in the preamble to NAFTA there is a commitment to sustainable development. This was contained in every environmental safeguard statement issued by environmentalists, and is roundly criticized because it is not binding. Currently, it is a symbolic reference, but new meaning to what the term calls for might be framed and the NACE should be responsible for making that concept operational.

Dispute Resolution. The dispute resolution mechanism under NAFTA is a three-step process that begins with consultation when there is a difference of opinion over the implementation of NAFTA provisions. There should be a role for the NACE to facilitate those consultations, working with existing committees established in the NAFTA. The second stage in the dispute resolution process is the involvement of the North American Free Trade Commission. The NACE could provide much-needed environmental expertise and should issue recommendations in cases where environmentally-related trade disputes are brought to the Free Trade Commission. Finally, when the North American Free Trade Commission cannot resolve its disputes, these disputes are referred to a panel. The NACE should have a role in intervening as necessary in such panel rulings.

The dispute resolution process raises a few additional points and questions. One issue that must be addressed is who identifies what is or is not an environmental trade dispute? The NACE should have that responsibility. Moreover, at the request of any party in the dispute the NACE should be available for recommendation and consultation at any step along the way in dispute resolution.

Another point which is critical is that the North American Commission should have the responsibility of creating a roster of environmental experts. This should not be the responsibility of the Free Trade Commission. If a dispute reaches the panel in an environmental and trade manner, the NWF would argue that three of the five panellists must be from the NACE roster. Another important role for the NACE would be to coordinate public input into a given conflict. Trade, for a variety of reasons, has not been very transparent over the years that the GATT has been in existence. The environmental community is used to greater openness and the NACE could play an important role in this regard. Another important question has to do with decisions by the NACE: should these decisions be by consensus or not? The Free Trade Commission makes decisions by consensus. If decisions are made by the majority, certain problems will be created. Likewise, allowing decisions to be made by consensus brings with it both costs and benefits. Nevertheless, this question must be addressed.

There is also the question about whether the NACE should be a standard-setting body. Here one must distinguish between product standards and process standards. Product standards are already called for in the NAFTA and the responsibility for minimum standards has been granted to certain international standard-setting bodies. A NACE should have a role in reviewing these standards. A NACE could also take on a more direct role in establishing criteria for the use of product standards. A final question to be considered is in which specific areas the NACE, rather than the North American Free Trade Commission, should have the ultimate responsibility for resolving a dispute.

Annual Reports. A third way that the North American Commission relates to the NAFTA is in the issuing of annual reports. Three kinds of reports should be conducted.

- First of all, an annual report should be conducted on the implementation of NAFTA's environmental provisions which will include summarizing and investigating complaints of citizens and non-governmental organizations that will form the basis of these reports.
- Secondly, an annual report should be conducted identifying areas where the NAFTA may be in need of assistance in order to meet its own stated goal on sustainable development. For example, the NAFTA chapters on agriculture and energy have not been analyzed to any great extent and have tremendous potential impact on the environments in Mexico, Canada and the U.S.
- A third element of the annual report, would be an overview of the adoption and enforcement of environmental laws in all three countries, with an eye toward where laws should be in existence and are not, where lax enforcement occurs, and where the situation might distort trade between the three countries.

Some environmental groups in the U.S. have called for much more expanded reporting on the part of the NACE. They call for an annual report on the enforcement, on the state of environmental laws across the border and whether those laws have anything to do with trade or might in the future. There is also a suggestion that this be conducted at a provincial and state level as well as at the national level.

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Transparency. A fourth important role for a NACE should be in identifying it as an instrument for making the trade processes with respect to environment, more open and more transparent.

Supplemental Agreements. A fifth way in which the NACE relates to the NAFTA is with regard to supplemental environmental agreements. These agreements will focus on five specific areas.

The first issue which will be considered in a supplemental agreement is process standards which are not addressed in NAFTA. A NAFTA panel seeking guidance from the GATT on this issue would likely be encouraged to adopt an interpretation on process standards similar to their own in the recent tuna-dolphin GATT Panel decision. This would engender a great deal of political conflict. There is need for guidelines and criteria in the treatment of process standards. Another topic for a supplemental agreement is the upward harmonization of standards. The NAFTA countries are committed to this, but there is no timetable. The supplemental agreement will establish a timetable. Thirdly, in the NAFTA there are general areas where future activities are outlined. For example, in land transportation there is a call for the eventual compatibility of environmental standards affecting land transportation. That is something the North American Commission should be involved in through the supplemental agreements. Fourthly, Article 2019 talks about the suspension of benefits for countries who do not implement the NAFTA provisions correctly. This brings up the issue of countervailing duties. Eventually certain trade remedies must be developed to cover cases where NAFTA provisions are not implemented correctly. The final area for consideration by supplemental agreement is that of subsidies. What kind of guidelines should apply to subsidies? NAFTA has not dealt with that effectively. On one hand, governments should have some flexibility in using their general revenues to invest in environmental prevention and clean-up. On the other hand, many environmentalists question why taxpayers should pay for these costs and believe that they should be internalized into the business costs and either passed on to consumers or borne by the industry itself.

Enforcement. A sixth area where the NACE might relate to the NAFTA is in the enforcement of environmental laws. This is something that has been advanced by

organizations other than the NWF. A number of groups believe that the North American Commission should have regulatory authority throughout North America. This suggests an EPA-type body with jurisdiction to go into Canada, the U.S., and Mexico where enforcement is not occurring, and to levy fines or institute some other punishment. Such extensive enforcement powers raise many questions particularly those of national sovereignty.

Co-operation. The seventh area where NACE might relate to NAFTA would be in the cooperative side of NACE. That is the desire of those who have framed this commission with the sole aim of promoting an environmental agenda that may have nothing to do with trade directly. It may be that there will be problems because the experience in all three countries can best be dealt with on a trilateral basis. It will likely have an impact on trade by, in some cases, attempting to defuse the kinds of conflicts that are very difficult to deal with, once they enter trade and the environment dispute process.

Three questions underlying the prospective NACE and its relationship with NAFTA are as follows:

What improvement to NAFTA can the NACE make? Firstly, the NACE brings much needed expertise to the process. Some members of the GATT Secretariat simply do not know what is going on in certain areas of the environment. Secondly, there is the need for counterweight; a NACE that consists of the environmental ministers can provide some balance to the North American Free Trade Commission consisting of trade ministers. There are ways to involve NGOs in the workings of the Commission but if it is going to be related to trade, it will be immediately marginalized if the NACE is a "citizens' commission". The NACE needs to have the weight and the substance of Cabinet-ranked environment ministers to provide balance to the Free Trade Commission. Thirdly, the

cooperative nature of the NACE can reduce conflict within the three countries.

Are alternate institutional arrangements preferable or possible? The answer is no. There is some concern on the part of people who have been involved in a number of commissions, for example the IJC between Canada and the U.S., and the International Boundary Waters Commission. There are proponents of these commissions and there are critics, but a NACE appears to be complementary to what exists now. The NACE is not an attempt to elbow out existing mechanisms but an attempt to work with them. A second reason that it is important to keep this out of the Free Trade Commission is to provide some balance to the process. Integration through the Free Trade Commission would not work.

Is there a relationship and linkage to the NAFTA? The question at this point is, *how* the linkage is going to be made not *if*. The cooperative nature of the NACE is a given; the parties accept that. It is likely that the NACE will have some reporting responsibilities and that it will serve as an inquiry point on trade and environment issues. NACE may oversee the implementation of the NAFTA's environmental provisions as well. The difficult areas will be the following: the role of the NACE with regard to dispute resolution, supplemental agreements and the role the NACE will have in those ensuing negotiations, and finally, whether or not the NACE will have a role as an enforcement agency.

6. FIVE LESSONS OF THE INTERNATIONAL JOINT COMMISSION

Paul Muldoon

There are many lessons one can learn about institution building from the experience of the International Joint Commission (IJC). The five lessons outlined below are of relevance here. It is important to first briefly review the history of the IJC because the lessons identified must be articulated in the context of both the institution's history and its mandate.

The IJC is a bilateral body created from the Boundary Waters Treaty of 1909. The Boundary Waters Treaty gives the IJC four general categories of functions. The first is an administrative function over certain rivers. The second function is a quasi-judicial power. The IJC has the power to make decisions concerning diversions, improvements, and alterations of boundary waters and transboundary waters. Historically that was its main function from about 1910 to the mid-1960s when priorities included development of all boundary waters, in particular, hydro-electric development and related major river improvements. The third function of the IJC is investigative. The IJC is given investigative power on reference, by and large from the governments, on any matter affecting the common frontier. This is an enormously broad power which has been used periodically; it certainly does demonstrate that it has been used more in the latter half than in the former half of its existence. The fourth power, the power to undertake an arbitration between Canada and the United States, has never been used.

Another characteristic of the IJC in the Boundary Waters Treaty context is that not only was the IJC given the above functions and powers, but also guiding principles. One principle, for example, is Article IV which states that one party cannot pollute to the detriment of health or property of the

other; the "Thou shalt not pollute section" which, for 1909, was quite remarkable.

Apart from powers it derives from the Boundary Waters Treaty, the IJC derives further powers from an array of different agreements, the most known of which is the Great Lakes Water Quality Agreement. The Great Lakes Water Quality Agreement gives the IJC additional reporting requirements, but also certain powers to initiate its own work.

Over its 80-year history, if one were to ask, "what is the IJC's record?", a range of replies would ensue, from "not very good" to "an excellent model of binational cooperation." Differences in replies will be based in part on who is asked, but in part also by which era is referred to. In its 80-year history the IJC has gone through different eras and certainly the view of whether or not it has worked depends on the time frame referred to. At present, the IJC is entering an era with more challenging issues and higher expectations of the public.

Nevertheless, the history of the IJC demonstrates its role as a fact-finding body where impartiality and non-partisanship have prevailed. The IJC has acted as a forum in which a variety of interests have had their say and it has facilitated both information exchange and coordination. Consequently, it is a tool for government accountability and it is on this notion of accountability, that the lessons of the IJC will be outlined.

The first lesson is that what makes the IJC relevant to environmental groups, to industry, and to government, is not only the Commission itself but the rules by which it operates; that is, the Great Lakes Water Quality Agreement and the Boundary

Waters Treaty. People regard these documents as models and believe in them. Therefore, it seems the lesson is that an institution can be created but one must also look to its mandate and the substantive rules which govern that institution. If those rules have not got widespread support, and thereby a sense of legitimacy, neither will the institution which has the oversight mechanism for them. It is important to recognize that part of the relevancy and the currency of the IJC remains with the substantive mandate it has and the rules that it is designed to oversee.

The second lesson is that what is on paper is different from what actually happens. The IJC has powers that have never been used. But over the years the question of whether or not the IJC has been effective is not only directly related to the wording of the statutes and the international agreements from which it derived its mandate and its powers, but also a number of other factors. For example, its effectiveness is dependent upon access to information and data held by the governments, appropriate financial resources and a commitment of government staff time to the Commission. These non-juridical or non-legal aspects of the institution are crucial, and so the lesson is that in inventing an institution one must anticipate and accommodate that issue.

The third lesson is one that the IJC is still trying to deal with. An interesting challenge to the Commission that has affected its success has been its ability to report and its ability to put things on the table that have, on some days earned praise for, but on many other days embarrassed, the government. Both the importance and the difficulty in doing that must be underlined. For example, it is sometimes difficult to attain all the necessary data of loading of sources of pollutants to the Great Lakes. Much merit lies in discussing comparative analysis as a measure or a means to get accountability.

The fourth lesson is that the IJC had to begin to respond to the public and learn how to do

that effectively. There has to be a concerted effort to design a commission to incorporate a participatory environment. If that were done, all concerns would be dealt with more routinely and formally. Unfortunately, public participation is often seen as an add-on measure rather than as an indispensable part of the process itself.

Finally, the fifth lesson of the IJC is that the role of sub-nationals - the provinces and the states - cannot be underestimated. This is especially important because many environmental issues are dealt with on the provincial level from a constitutional perspective. The Federal government can no longer negotiate international commitments and then rely on provincial good will to implement them. A more effective mechanism is needed. Some U.S. border states, frustrated with the inability to develop water quality standards, have developed or are developing a process of their own called the Great Lakes Initiative. So questions arise: who drives the process, do the states or provinces drive federal policy, and how does this interface with international agreements?

International commissions and boards have potential to achieve a great deal. One of the things that they must do is drive home the notion of environmental accountability. But this kind of accountability cannot be taken for granted; it must take into account what has been learned through the Commission. The fact remains that there is an international model, in fact a global agreement such as the Great Lakes Water Quality Agreement, that continues to strive to live up to the expectations of the Great Lakes' public. There are lessons to learn from this.

7. DESIGNING NACE

Jean Hennessey

One reason that the International Joint Commission has not worked at certain times and in certain areas is that some prime ministers and presidents have not wanted it to work. The question one must ask is: how has the IJC performed overall, over time? Notwithstanding questions of transparency, the IJC has had enormous success dealing with some very difficult questions. There is a lot to learn from the operations of the IJC that might be useful in considering the design of NACE.

The IJC has traditionally operated by consensus. Through this consensus it is effectively removed from the realm of a national position into a presumably more objective international position. The arbitration powers of the IJC have never, and should never, be used to resolve difficulties. Unlike a representative to the United Nations, one does not represent one's country when one is on the Commission; this is an important difference. IJC commissioners report to the parties as would a foreign government. That is something to consider when designing a NACE and determining whether ministers should sit at the table, or whether NACE appointments should be comparable to IJC Commissioners. IJC Commissioners are political appointees at the sub-Cabinet level, but are insulated from their political masters to a certain extent by the nature of the process. There should not be any regulatory or enforcement authority connected to this type of institution, partly because of the different federal systems and the importance governments attach to using different managerial methods to accomplish the same objectives and partly because regulation requires an enormous bureaucracy which would diminish the ability of an international commission to concentrate on its quasi-judicial, fact-finding, policy advisory role.

Despite the fact that the IJC does not have formal regulatory or enforcement authority, it does have an authoritative role to play. When governments refer questions to the IJC, the IJC appoints an expert body, including seconded government officials who act in their personal and professional capacities rather than in the capacity in which they may serve in government. Public hearings are held which provide for public participation in a variety of ways. Then a report is made to the Commission which in turn goes through an evaluation process that includes public hearings. A common report is then passed to both governments. In terms of fact finding, which is a critical element of dispute settlement, these reports are very important. The findings have been generally assumed by both governments and by most observers as being authoritative on the facts and generally the governments have implemented the recommendations of the IJC.

In considering the history of the IJC, the Commission has been referred a great number of questions from government. Over time, it is apparent that one of the issues that has always caused enormous controversy has been the question of similar standards. While the IJC has never suggested that there ought to be similar standards, what has been done which has been very effective is to refer to "objectives". Considering the distinction between objectives and standards, the setting of common objectives and letting the jurisdictions determine how they implement those objectives has been, on the whole, a very successful mechanism.

The mandate and the operating mechanisms, in short the governing agreements of both NAFTA and NACE, should be subject to periodic review and this requirement ought

to be built in. In 1909 the issues were hydro-electric power, transnavigation and irrigation, not the environmental problems that have consumed so much of the IJC's energy. It is useful to consider the need for a relatively broad process mandate that would work despite changing circumstances.

Another issue that must be considered in designing a NACE is whether what is proposed for NACE would work as well if it were interacting not with a NAFTA but with an AFTA, an Americas Free Trade Agreement. If NAFTA succeeds, an AFTA is likely to come about fairly soon. Another question arises given that there is no common vocabulary, let alone a common language, between those in the trade communities and the environmental communities. It is unlikely that in the near future the trade community will come to fully understand the environmental community, or the reverse. This might as well be recognized and one must ask the question, how will this be managed?

In her statements to the Subcommittee on International Trade Committee on Finance of the United States Senate, Kathryn Fuller, president of the U.S. World Wildlife Federation, noted several things that are useful to think about. She noted that there is a broad agenda aside from the disputes that will arise under NAFTA, connected to economic and financial and trade questions. For example, considerations that are not part

of the cost of the production of a good necessarily, that are not reflected in their price, still must be quantified. This ought to be a subject for the NACE as it will not be a subject for NAFTA except perhaps indirectly. Kathryn Fuller's comments are reproduced in full as Appendix D of this report.

In designing a NACE it is important to keep in mind both what works and what does not work. For example, the Canada-U.S. Air Quality Agreement is an empty piece of paper. It protects the two governments from any kind of interaction with the public and allows the governments to do whatever they please with no meaningful binational review. For example, there was no Canadian outcry from any sector last year when the U.S. simply decided that it was not going to implement the Clean Air Act because Vice-President Quayle's Competitiveness Council decided that it was not appropriate.

In order to reassure the environmental community in the U.S., President Clinton must propose a concrete structure for a NACE and it is essential that this be accomplished with some haste. With the preceding issues in mind, the following outline (Figure 1) was prepared and suggests a possible role for NACE in relationship to the NAFTA.

Figure 1:



In order to address the troubling issue of accountability and to lend the body some viability, an annual North American Sustainable Development Summit could be held involving trade, environment and financial sectors. Such a Summit would provide a forum for the presentation of annual or bi-annual reports on the state of sustainable development in North American. NACE, NAFTA, and the financial sector would provide reports.

While both NAFTA and NACE certainly have stand-alone agendas, there should also be a common agenda which would be divided into two sections. In terms of substantive issues, a reasonable shared agenda might include issues such as trade in green consumer products and services, values to be attached to common resources like water and stumpage fees, publicly-funded cleanups and other subsidy questions, and tradeable permits. The convention and protocol related issues, such as adding the Biodiversity and Climate Change Conventions to the Preamble, is one way in which President Clinton would be able to bring comfort to environmentalists, immediately. Enforcement is a necessary consideration when considering substantive issues. A NACE ought not to be an enforcer just as it ought not to be a regulator. Nevertheless, there may be an appropriate role for NACE in contributing to the dialogue.

On the process side, there are issues such as the trade dispute mechanism or other matters with environmental components, how the experts get appointed, how one can begin to move towards harmonization of standards. One can talk about harmonization of standards without talking about similar standards, which will occur if parties can agree on common objectives. There are also the questions of who sits at the table. It seems that ministers are much too closely tied to the governments. More appropriate membership might be something along the lines of IJC

Commissioners who are the equivalent of a sub-Cabinet rank. While they are Presidential appointments in the U.S., they are not as closely tied to the Administration as the Administrator of the EPA, for example. Perhaps a working board with powers similar to IJC Commissioners could provide reports to ministers periodically and the ministers could still be called NACE Commissioners.

There are the further issues of financial support – where will the dollars come from to support a NACE? There is also a need for monitoring but there is no consensus on how to go about it and what the exact reporting process and educational role is. Finally, there is the issue of standing. The Great Lakes Water Quality Agreement has worked very well as an executive agreement; an executive agreement has essentially the same force as a treaty. If this could be written in or acknowledged in some way in a preamble, that might be sufficient to give a NACE equal standing. Also an annual or bi-annual event in which there was common reporting might also help achieve standing.

Finally, I would recommend that an annual North American Sustainable Development Summit be called by the presidents of Mexico and the United States and the Prime Minister of Canada to simultaneously consider annual reports by the governing boards of NAFTA and NACE. In this way, recommendations of NACE would be considered simultaneously with the economic well-being of the continent, and environmental issues would not be orphaned but considered as equally important to the future of the welfare of the citizens of North America.

8. THE SHARED CONSENSUS

Ronald Doering

In the real world, the environment and its economy are inextricably intertwined; it is only in our institutions that we continue to treat them as separate. The round table movement in Canada has emerged as one response to the fact that existing institutions are not coping well with most of the cross jurisdictional, cross departmental, cross disciplinary and cross temporal issues that now confront us. Until we develop new institutional arrangements that better integrate environmental, economic and social policy decision-making, many sustainability issues will receive fragmented and incoherent treatment.

NACE, then, must necessarily be a transitional arrangement until institutions are developed that truly integrate environmental, economics and social decision-making. While these institutions will take time to develop, it would be a missed opportunity in the meantime if we do not try to give NACE the capacity to address sustainability issues as much as possible.

For now, ten issues for future consideration emerge from the workshop's deliberations.

1. **The Dispute Resolution Mechanism.** NACE's mandate in this area is likely to be critical. All four speakers addressed this issue: There is already a good deal of law and policy on the question of using quasi-judicial bodies to resolve disputes.
2. **CUFTA.** There is a strong consensus that CUFTA has a lot to teach us. For example, the efficacy of Chapter 19 came up several times in the discussion. We should look at CUFTA through the prism of NAFTA.
3. **Role of NGOs.** There is a strong consensus that NACE can help NGOs to gain a role they do not enjoy now. This should be seen in the context that there are many examples around us of failed policies that did not employ innovative ways to not just consult but actually engage the public in policy making.
4. **Environmental-Legal Sovereignty.** To what degree are nations willing to give up environmental sovereignty? The pace and extent of change in Eastern Europe should serve to remind us that even the nation state as we have known it may be subject to more change than we can understand right now.
5. **The Role of Municipalities.** We do not have institutions that accord to municipalities the position that they will have to have in the future as more and more issues become essentially regional in nature.
6. **Enforcement Powers.** Should NACE have the power to enforce its decisions? The whole question of regulations and their enforcement deserve further study.
7. **The International Joint Commission.** The IJC can teach us a lot. What has worked, what has not and why? The IJC has developed a cross-national NGO community - an important and often underestimated contribution. The ecosystem approach is of profound significance and historic in its implications.

8. **Sustainability Reporting.** The more that NACE can emerge as a body concerned with sustainability issues the more likely it can be helpful in areas such as reporting i.e., sustainability indicators will be more helpful in the long run than environmental indicators.
9. **Membership.** Function should dictate membership but there is no consensus on whether membership should be at the ministerial level. More discussion is necessary here.
10. **The European Community.** The EC may provide some useful models that should be studied. NACE could be an important factor in the subsequent treatment of NAFTA by the three governments; further thinking and discussion of all of these issues is indicated.

9. ISSUES FOR FUTURE CONSIDERATION

Sarah Richardson

As 1993 unfolds, the debate over NACE could well revolve in important ways around the following eight questions.

1. Should a NACE exist independently of NAFTA, and be created notwithstanding the timing and ultimate fate of NAFTA?

Some argue that there might be a role for a NACE to play, independent of NAFTA, because NAFTA at present is not properly equipped to carry forward broad environmental policy issues such as common standard making or common policy making. NACE could provide a forum for the discussion of policy and the harmonization of rules, somewhat analogous to the European Commission which plays a role as a policy and rule maker and has gradually extended its mandate into the environmental sphere. However, concern exists that an independent NACE (and a possible parallel labour agreement), as an add-on to NAFTA might render NACE useless unless there is a commitment in NAFTA itself that these "add-ons" cannot be dropped at one party's convenience.

A second role for an "independent" NACE could be to complement the NAFTA or even CUFTA in the process of dispute resolution. This role would include establishing expert panels to consider scientific and technical questions, and providing names for a roster of panellists to be chosen to sit on environmental dispute panels. In fact, some can conceive of a NACE that would become a specialized body put in place to handle all environmental disputes, thereby replacing the North American Free Trade Commission in the environmental field. The North American Free Trade Commission now has exclusive jurisdiction for dispute settlement.

It might be difficult to give NACE a completely independent role in dispute settlement under NAFTA as it now exists. The parties to NAFTA have agreed that

disputes will be solved under Chapter 20. The three governments might be required to sign another treaty committing them to refer all environmental disputes to NACE using NACE procedures, if that Commission were to take on a broad and independent role outside of the structure of NAFTA.

2. Should a NACE have regulatory power to enforce environmental laws in all three countries?

It seems unlikely that the three countries of the NAFTA would agree to surrender sovereignty to a North American body, to the extent necessary to empower NACE to enforce the domestic environmental laws of the parties. Even if the prospects for regulatory authority being provided to a trilateral commission are slim, there might be some authority for a Commission to consider questions and make recommendations.

There are elements of NAFTA that will actually create common rules binding on all three parties and foster the development of common practices and standards over time. This authority is very different from regulatory authority to ensure that national laws are being enforced, or even some form of trilateral statute. In Canada, there are sensitivities between jurisdictions over a central government in Ottawa having enforcement and regulatory powers related to the environment. Even in the European Community, each Member State is both the implementer and enforcer of a centrally established Community rule of law. The European model might be one to consider.

Considering enforcement from a broader perspective, some supporters of "environmental countervail" see a role for NACE in the application of that countervail. "Environmental countervail" would be applied to goods and services whose prices do not reflect their full environmental cost.

There are concerns surrounding the idea of an environmental countervail such as how it will be determined, and how to prevent it from being abused. A NACE might set a range of "environmental prices" for goods and services in the form of an index, which was agreed upon at a trilateral level.

There may also be an economic role for NACE in identifying various elements of the environmental products industry most important to the infusion and sharing of critical environment-enhancing technologies on a continent-wide basis. A NACE might also be employed to set up a schedule for more rapidly phasing out tariffs on some of these technologies to facilitate that process. The question of the tariff phase out provisions in the existing NAFTA agreement make no provisions for an accelerated phase out of tariffs on goods in the environmental products industry. There appears to be no reason why that sector could not be singled out for special treatment and given a much more rapid phase out of those particular tariff barriers than the ten-year normal convoy-like phase out on the general tariff regime applied at present.

3. What will be the relationship of a NACE to the governments that establish it?

Some argue that the issue of the independence of the International Joint Commission is critical given that one perceived problem with the IJC is that it is too politically dominated. The IJC responds to references from government and rarely takes its own initiatives. Some contend that this creates a situation whereby the governments decide which disputes get considered by the IJC and one government is able to prevent an issue from being discussed. This might be particularly true if a NACE is ruled by consensus. There is the view that consensus, as opposed to majority vote, is necessary for providing for evolving relationships because of the political nature of the discussions that NACE will conduct.

In order to maximize its credibility, a NACE could be given a broad mandate which would include independence of initiation with regard to environmentally-related issues. Independence of initiatory authority is an important issue, not only for the credibility of NACE among the three governments, but also for its credibility in the eyes of stakeholders in the three countries.

4. Who should sit at the table?

There are a number of issues surrounding the question of who sits at the NACE table. Including ministers in the Commission has the advantage of bringing a senior political voice to the Cabinet table. Membership at the highest political level would also help to ensure that the NACE provides a powerful counterweight to the North American Free Trade Commission and might help give the new Commission the prominence and credibility that it deserves. However, the inclusion of ministers might have the effect of restricting the issues discussed by the Commission.

Another issue is the role of the public in the process. The public has an important role to play on both ends if NACE contributes to the improvement of dispute resolution in environmentally related trade conflicts, and also, if NACE plays a role in recommending improvements to NAFTA. NACE might also play a role in identifying areas of improvement for NAFTA once the agreement has been implemented and administered.

There is the view that it is critical in the environmental area to include all the participants, which in Canada includes provincial governments. In Canada, representation to a NACE must include some form of representation from the provinces. This is true with respect to the effective operation of a NACE whether as a standard-setting body, an enforcer, or both.

The suggestion of Summit meetings as the forum for NACE evokes several concerns. One is that a summit-approach would suggest a NACE meet only once a year and be event oriented. There is a strong feeling that the NACE should in fact have a Secretariat and be an ongoing operation providing continuous activity as opposed to a once-a-year meeting. Ministers might be involved in a Summit if that were to occur. But for the day-to-day operations of the Commission, the Secretariat and Commissioners would not be political. The Summit could also be conceived of as a full-blown meeting of heads of government, rather than an annual meeting of ministers.

There are some parallels between a proposed NACE and the European Community model with the European Commission and the proposed EC's regulatory agencies. In Europe, the Council of Ministers is a decision-making body that meets yearly and the particular ministers are involved in individual decisions. Those ministers also have another body called the Committee of Permanent Representatives of Heads of State of Government which is an advisory body that operates all year round. It works with the European Commission in developing the correct policies or the appropriate instruments of law that will then be put to the Council of Ministers for a decision. This is a role model which combines a political with an advisory body. It works well. This would require a permanent Secretariat, along the lines of the Committee of Permanent Representatives of Heads of State of Government. But it seems entirely possible to construct a Commission that was headed by Cabinet level representatives that could have under it, a non-governmental Advisory Committee from which it secured objective, critical advice and public input.

5. Would a North American Commission on the Environment be more appropriately called a North American Commission on Sustainable Development?

It is likely that a NACE will consider issues of trade and environment. The effect of trade on sustainable development should probably involve consideration of issues of human well-being, poverty and equity. Eventually such questions will be considered if one is to truly promote sustainable development through trade.

In support of the term "sustainable development" versus "environment" in the naming of this body, it should be recalled that the NAFTA has been established with the promotion of "sustainable development" written into the text as one of its ultimate goals. The question then becomes: what body is going to inform NAFTA on an ongoing basis what is this sustainable development that NAFTA has already been instructed to promote. In addition, it is argued that NAFTA already encompasses a larger set of considerations and a broader criteria than environmental protection alone.

6. How have Mexican Environmental NGOs reacted to the NACE proposals so far?

Some aspects of the Mexican NGO community's proposal for a NACE are similar to the American proposal. It includes the tabling of an annual report. It also includes a very novel idea which would establish parameters of maximum tolerance as opposed to specific standards for environmental impact. Those tolerances would not necessarily be based on national borders but on regional ecosystems. Violations of these environmental standards would be investigated to determine if they were related to trade.

The principal organizational structure of NACE would involve a meeting of the governments. However, the Mexican NGOs also propose the creation of NACE sub-units consisting of academics and NGOs. This includes a committee of environmental experts. Mexican practice includes a greater role for academics than does the American or Canadian tradition.

The annual report of the proposed Commission would include a chapter on the changing laws, regulations and standards adopted by each of the countries for the protection of the environment. It would also contain chapters on administrative records on how to enforce the laws, a study of harmonization of standards by each government, environmental impacts on an annual basis, and the participation of each country in environmental agreements. The report would also evaluate the level of public participation in the operation of the NAFTA and provide a detailed environmental analysis, sector by sector, of the environmental impact of the NAFTA.

Mexican NGOs also suggest a mandatory role for a NACE in providing a forum for public comment. The Mexican government has not responded to this proposal. The Mexican government's vision of the Commission appears to favour an annual summit on cooperative environmental matters. The government has not agreed that the NACE should deal with trade. At present, there is a large gulf in Mexico between the NGO community and the government. The principal fear among academics is that NAFTA will create pollution havens in Mexico and that they will be taken advantage of by western investors.

7. What is the timing of establishing NAFTA and NACE?

In December 1992 there was some speculation as to whether the NACE would be completed by January 1993. It was not. The meeting of officials in December was

postponed as they waited to hear what the new U.S. administration would do. Moreover, in December the Mexican government was still reluctant to endorse a full-fledged North American Commission on the Environment.

In the U.S., President Clinton has declared himself to be committed to the North American Free Trade Agreement as well as to the successful completion of the Uruguay Round. The President is on the record as confirming that he does not want to renegotiate the text of NAFTA. He is also committed to broader supplemental agreements. It is unlikely that the supplemental agreements will be in place prior to May 31st, 1993 which is the date on which U.S. fast-track authority expires. The negotiation of the supplemental agreements will be more complicated. A one-year extension of the fast-track authority might allow for the completion of some such supplemental agreements.

President Clinton must tackle issues of environmental protection directly in order to maintain his credibility with U.S. environmentalists. At present, that credibility is high and it could take less to satisfy environmentalists in the short term that it took with the previous administration, which the environmental community was very suspicious of. Therefore, President Clinton will probably be given more latitude than was President Bush, at least if President Clinton moves quickly. Nevertheless, it is very unlikely that NAFTA will be completed prior to May 31st, 1993. NAFTA is not a one-shot deal, but a process that will unfold on into the future. The work of a NACE will not end when NAFTA is sent to Congress. It is an ongoing institutional process in North America.

In Canada the issues are somewhat different. There could be an election in Canada in the summer of 1993. The parties to NAFTA may want to see the Agreement concluded prior to that because there is no assurance that a new Canadian government will be

committed to NAFTA. President Clinton appears to want a trade agreement, believes it is important to his economic future, and is probably aware of the upcoming Canadian election.

It may still be possible to strengthen the environmental mandate within NAFTA itself, and in particular, the environmental mandate of the North American Free Trade Commission, as opposed to relying on a separate environmental commission. If there were only one or two manageable items that could be easily agreed by all three governments, they could readily agree to incorporate them. However, the very real danger, exemplified in the ghost of the fisheries and maritime boundary dispute, is that once one party starts putting additional items on the table, others add their wishlist and the process quickly spins out of control. Thus even if one can readily agree on a substantive package of elements that should be in a NAFTA, it might be unwise to reopen the agreement.

As a starting point, it might be possible to hold a trilateral "Shamrock Summit" in the spring. This would give the three governments an opportunity to submit themselves to additional disciplines which would give further definition to NACE and in so doing, strengthen the interior operation of NAFTA while avoiding the process of having to change the text of NAFTA itself.

There is considerable pressure on the two Presidents and the Prime Minister for NAFTA to pass. In Canada there is an election pending. The Prime Minister must pass NAFTA sooner rather than later, or there is no guarantee that it will pass at all. In the United States, it is clear that NAFTA will not pass through Congress without provisions, or supplemental agreements, which address environmental concerns. A NACE would address this imperative.

Putting the NAFTA and the NACE together produces an attractive substantive package. The real question for those concerned with

the integration of development and the environment is to know how the vision of the long-term management of resources and their availability will be integrated into these critical mass processes brought about by NAFTA. That is, critical masses of people moving, deciding and adjudicating on a North American basis. That is where NACE acquires its relevance.

8. What sort of NACE will withstand changes to a NAFTA, or will another new institution be necessary?

In terms of looking to the future, one must consider the move towards extending NAFTA to Chile and other countries and the opportunities that this process provides to the countries of the NAFTA. As well, one must consider the extension of free trade to cover the whole of the Americas and the danger of acquiring too many Chiles, too quickly. The prospects of an American Free Trade Agreement that is imposed technically in the next few years is very unlikely. However, there appears to be a view in Latin America that if Chile accedes to the NAFTA, then other groups of countries will apply. The next group might be all of South America rather than just Argentina and Brazil, or it might be Columbia and Venezuela together.

Movements for Latin American integration, once prevalent in the 1960s, have begun to reappear in the 1990s with considerably more force. For example, the Central American Common Market has come back into existence. If Chile is the next stage for a NAFTA, there will certainly be applications from other Central and South American countries. A certain momentum will be created that will be very difficult to resist, particularly if the EC makes an arrangement with Eastern Europe over the next five or ten years. Conceptually, one might now begin to think of the political institutions for the future that will integrate the environment into the context of free trade for the Americas as a whole, or indeed, the Asia-Pacific region that lies beyond.

APPENDICES

APPENDIX A

List of Participants

APPENDIX B

Agenda and Background Paper

APPENDIX C

DOCUMENT 1

Environmental Provisions of Free Trade Agreement Win
Support Of National Wildlife Federation - Press Release

DOCUMENT 2

Draft Outline For Trilateral Environment Commission,
Government of the U.S.

DOCUMENT 3

Letter from Carla Hills to Mr. Jay Hair, President of the
National Wildlife Federation

APPENDIX D

Outline by Robert Page

APPENDIX E

Statement of Kathryn S. Fuller, President, World Wildlife
Fund, to the Subcommittee on International Trade, Committee
on Finance, United States Senate, September 16, 1992

APPENDIX A

PARTICIPANTS

| | |
|---|---|
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| Stewart J. Hudson National Wildlife Federation | |
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APPENDIX B

Workshop on The North American Free Trade Agreement (NAFTA) and A North American Commission on the Environment (NACE)

December 7, 1992

66 Slater, 9th Floor, Ottawa, Ontario

AqENDA

9:30-9:45: Introduction and Statement of the Issue

Workshop Chairs: Pierre Marc Johnson, NRTEE
David Runnalls, ORTEE

9:45-10:00: The NACE Proposal and its Current Status

Janine Ferretti, ORTEE
Stewart Hudson, National Wildlife Federation (U.S.)

**10:00-10:45: CUFTA Dispute Settlement Mechanism and the Environment:
A Review of the Record**

Armand de Mestral

How and how well does the existing Canada-US Free Trade Agreement dispute settlement process deal with cases with environmental dimensions? Why does it produce the results it does in such cases as west coast salmon and east coast lobster?

10:45-11:00: Refreshment Pause

**11:00-12:00: Negotiating the Environmental Provisions of NAFTA:
What Gains Were Made?**

Bob Page, NRTEE

What environmental provisions were offered, both with Canada and the United States and at the intergovernmental negotiating table, in negotiating NAFTA? Which ones were and were not accepted nationally and intergovernmentally and why? What language remains in the NAFTA agreement from the standpoint of sustainable development? How can the NAFTA dispute settlement process, as it now stands, be expected to work on environmentally-related cases?

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12:00-1:00: Lunch

1:00-2:00: The NAFTA-NACE Relationship

Stewart Hudson, National Wildlife Federation (U.S.)

What improvements to NAFTA can and should a NACE make? Are alternative institutional arrangements possible and desirable? What should the relationship and linkage between the two bodies and agreements be?

2:00-3:45: Designing NACE

Paul Muldoon, Pollution Probe

Jean Hennessey, Dartmouth College

How should a NACE be designed? What lessons can we learn from the experience of the IJC and other North American environmentally-related bodies, and the experience of the Europeans and others?

3:45-4:30: Recommendations, Alternatives and Issues for Future Consideration.

Ronald Doering, NRTEE

What proposed elements of a NACE appear to command a broad consensus? What are the alternatives offered for elements where consensus does not yet exist? What issues should be identified for intensive exploration in the coming weeks and months?

BACKGROUND PAPER

John Kirton and Sarah Richardson

INTRODUCTION

At present, the governments of Canada, the United States, and Mexico are engaged in negotiations for the establishment of a new North American Commission on the Environment (NACE). Such a body could have an important role, in its own right, in dealing with those environmental problems on the broader North American continent that are truly trilateral in scope and to address some bilateral concerns, especially Canada-US, or Canada-Mexico. Even more importantly, it could play a major part in forwarding the cause of sustainable development and addressing trade-related environmental concerns arising from the environmental provisions of the recently negotiated but yet to be ratified North American Free Trade Agreement (NAFTA).

The intention to establish NACE was announced on September 17, 1992, by Minister of the Environment Jean Charest, EPA Administrator Bill Reilly, and Secretario Colosio at their first meeting in Washington. At a meeting that day with several NGOs from Canada and the U.S., the environment ministers described the general objectives of the Commission as: facilitating environmental co-operation among the three countries of North America; and addressing trade-related issues arising from NAFTA. The inclusion of NAFTA-related issues in the NACE mandate was largely a response to the concerns of environmental organizations that there be an institutional mechanism to ensure that trade-related environmental problems are addressed. A concept paper prepared by the U.S. Government was circulated at the time of the September meeting (copy attached).

Since the September meeting, the referendum on the Charlottetown Accord, and the U.S. Presidential election and transition process have made it more difficult for governments in Canada and the United States to give full, detailed consideration to the relevance, role and structure of NACE through a process of multistakeholder consultation. Yet with the prospect of the three countries' environment ministers meeting again as early as January to take important decisions about the new body, it is important that the process of detailed consideration and informed comment by affected parties outside government should take place now. The December 7th workshop, sponsored jointly by the National Round Table on the Environment and the Economy and the Ontario Round Table on the Environment and the Economy, is designed to contribute to that process of timely, informed consideration.

1. *The CUFTA Dispute Settlement Mechanism and the Environment: A Review of the Record*

Consideration of the relevance and possible structure of the new NACE must begin with a review of the framework and operation of the existing Canada-U.S. Free Trade Agreement, and, in particular, the operation of its dispute settlement mechanism to date on cases with significant environmental dimensions. CUFTA designed, negotiated and ratified without input from environmental groups or an environmental review, attracted criticism for its neglect of environmental values on several grounds.

Substantively, the Canada-U.S. Free Trade Agreement (CUFTA) offers no more protection to the environment than does the GATT. Environmental issues in the GATT have traditionally been dealt with under Article XX, which is incorporated into the CUFTA by virtue of Article 1201. However, early decisions under the CUFTA which have considered conservation issues under the Chapter Eighteen Bilateral Dispute Settlement Mechanism (BDSM), indicate that a CUFTA Panel might be more inclined to allow an Article XX exception than GATT panels have done in the past.

The clearest example of this is illustrated in the West Coast salmon and herring dispute between Canada and the U.S. In 1987 a GATT panel considered Canadian regulations requiring a 100% processing requirement on West Coast salmon and herring. The panel found that article XX(g) would save a restrictive trade measure only if it was taken in conjunction with production restrictions and if it was primarily aimed at rendering those restrictions effective; the Canadian processing requirement was held to be a restrictive trade measure and was not saved by Article XX(g).

In 1989 the U.S. invoked the Chapter Eighteen BDSM in order to challenge Canada's then 100% landing requirement of all salmon and herring caught in West Coast Canadian waters. Again, the Canadian government defended its regulations arguing that they were exempt from Article XI by virtue of Article XX(g). The CUFTA Panel noted that it was not the purpose of Article XX(g) to allow the trade interest of one state to override the legitimate environmental concerns of another. The Panel held that measures protected by Article XX(g) included those that were part of a genuine conservation program. The Panel ruled that Canadian landing requirements could be considered primarily aimed at conservation, if provisions were made to exempt from landing that proportion of the catch which, when exported without landing, would not impede data collection.

A second case that has been considered by the CUFTA Chapter Eighteen BDSM is the East Coast Lobster Case. In that case the Panel declined jurisdiction over the dispute on the grounds that an American measure, banning the sale of undersized lobster, was governed by Article III of the GATT (national treatment) because it applied to both foreign and domestic products. The Panel did not proceed to consider the U.S. argument in the alternative, that if the regulation was governed by Article XI, it was saved by Article XX(g).

There are some procedural issues in the CUFTA BDSM that may account for the CUFTA Panel's broader interpretation of Article XX(g) as compared to the previous GATT Panel's interpretation. Primarily, there is the scope in the roster of panellists to include "environmentalists" on Chapter Eighteen panels. At present, there is at least one panellist with considerable expertise and familiarity with environmental issues. The Commission has considerable flexibility when choosing panellists in Chapter Eighteen disputes to ensure that a panel is composed of trade and issue-specific experts.

A second advantage of the BDSM which is unrelated to the example above, but could prove useful in disputes involving environmental standards is the provision whereby one party can force another party to have scientific or technical issues considered by a panel of experts. Under the GATT, a complaining country cannot force a reluctant country to agree to such a panel; this leads to stalemates over scientific evidence such as occurred in the EC-US hormone beef case.

2. Negotiating NAFTA: Environmental Progress and Possibilities

In both Canada and the United States, the development of national positions and the intergovernmental negotiations benefited from the substantial involvement and contribution of environmental organizations inside and outside government. As a result, NAFTA as negotiated contains several provisions that represent a substantial step forward in integrating economic and environmental considerations. Most impressively, NAFTA is the first major trade liberalisation agreement that specifies among its fundamental purposes, in the preamble, the promotion of sustainable development and the strengthening of the development and enforcement of environmental laws and regulations, as well as undertaking to implement its provisions in a manner consistent with environmental protection and conservation (Article 102: Objectives). It is also exceptional among international trade agreements in according primacy to the claims of the environment over those of the economy in the event of conflict between its provisions and those of the three pre-existing major international environmental agreements with trade provisions, the 1973 Convention on Trade in Endangered Species, the 1987 Montreal Protocol on ozone and the 1989 Basel Convention on hazardous wastes (Article 104: Relation to Environmental and Conservation Agreements). It is thus with some solid foundation that the Canadian Government's "North American Free Trade Agreement: Canadian Environmental Review", released in October 1992, can conclude "that as a result of the NAFTA, future economic development will be implemented with greater environmental awareness." (p. 12 Executive Summary).

Yet from the standpoint of sustainable development important questions remain, particularly in regard to the dispute settlement provisions of NAFTA. There is no direct provision for individuals with environmental expertise to be included among the panellists available for or actually dealing with cases with environmental dimensions, nor any automatic procedure for outside groups to bring relevant scientific expertise or environmental information to bear. The fast pace and closed process of the dispute settlement mechanism, while understandable from an entirely trade perspective, makes no allowance for the more open, transparent, participatory, multistakeholder process at the core of sustainable development.

In addition, there were several innovative environmental proposals advanced within national governments or forwarded at the intergovernmental negotiating table that were not incorporated into the agreement negotiated by the Bush administration. Some may well be worth revisiting in the interests of improving the ability of NAFTA to respect the standards of sustainable development. While it is important that the existing, duly negotiated NAFTA deal, reflecting a balance of concessions from all three parties, not be left unratified for long, nor reopened so as to give only the United States an opportunity to secure the "improvements" it seeks, the concerns of the incoming Clinton administration may well provide an opportunity to secure some of the as-yet-unrealized environmental requests, and strengthen the contribution NAFTA can make to sustainable development. It may be possible to accomplish these purposes, without opening up the existing agreement, for example, by, signing additional undertakings that add to or interpret the existing provisions.

3. The NAFTA-NACE Relationship

In seeking to strengthen the contribution NAFTA can make to the cause of sustainable development, it is natural, and appropriate, to begin by looking at altering provisions "built in" to the existing agreement, rather than retreat immediately to "add on" environmentalism encoded in parallel agreements. The next step, however, is clearly to consider how the interrelationship between NAFTA, on the one hand, and NACE and other bodies such as the IJC on the other can be made more strong, direct and automatic, in the interests of improving integrated economic-environmental decision making, the environmental sensitivity of NAFTA, and the economic sensitivity of NACE. Here the task is to identify, from among those particular features of NAFTA requiring environmental improvement, those which could benefit from action on the part of outside bodies. Moreover, it could well be that the existing array of environmental bodies on the broader North American continent could serve some of these purposes, leaving NACE to concentrate on those where its comparative advantage is greatest.

Several possible ways of strengthening these relationships may warrant consideration. The standard of integrated decision making, and the Roundtable experience in Canada, suggests that individuals from both the economic and environmental community should be involved in both the NAFTA and NACE institutions, perhaps from the ministerial level on down. Having a small, common core of individuals involved in both bodies could contribute to this end. It might be desirable to establish (through evolving precedence if not articulated-in-advance commitment) the practice that environmentally-related disputes within NAFTA automatically engage NACE and trigger particular processes within it. Reciprocally, NACE could be given a right to trigger automatically particular processes within NAFTA. It is even possible to imagine a process in which, in cases where the environmental dimensions are paramount, NAFTA could delegate some or much of its competence to a dispute settlement process within NACE itself.

4. Designing NACE

To fulfil these heavy NAFTA-related responsibilities, as well as to meet the growing number of genuinely trilateral North American environmental problems of concern in their own right (migratory birds and species) NACE must be created with sufficiently ample powers and resources, and appropriate processes, procedures, and personnel. Here, several questions emerge:

How should NACE divide its focus between the trade-related concerns of NAFTA and the essentially environmental issues of effectively trilateral scope? What trade-related concerns should the NACE address and what roles and activities should it undertake? What broader North American environmental issues and activities should it take up, and which should it leave largely to existing bilateral environmental bodies?

Should NACE be designed more as a quasi judicial body with autonomous powers or more as an advisory and consultative body under complete national government control?

What would the relationship of the NACE be with the FTC, its subcommittees and working groups, and with the NAFTA dispute settlement process, as well as with such bodies as the IJC?

How institutionalized should NACE be? In addition to a regular forum for ministerial oversight, should it have a permanent secretariat, a dispute settlement capacity and a dedicated scientific, investigatory or even enforcement capability?

What role would NGOs and other stakeholders have in NACE's operations? How open, participatory, inclusive, and consensus-oriented would its operations be? How timely, efficient, effective and scientifically sound would they be?

How would NACE receive and pursue cases from governments and outside organizations? Could it initiate cases on its own? Who would have to agree before a full-scale investigation was launched or concluded?

Is there any role at all for provincial and state organizations in the operation of NACE?

APPENDIX C

DOCUMENT 1

Environmental Provisions Of Free Trade Agreement Win Support Of National Wildlife Federation

WASHINGTON, D.C. - Following closely on the heels of a pledge from North American Free Trade Agreement (NAFTA) governments to create a commission on the environment, the National Wildlife Federation (NWF) announced its support today for the NAFTA's environmental provisions.

"We are satisfied that substantial progress has been made towards establishing protection of the environment as a cornerstone of NAFTA", said NWF President Jay D. Hair. "We believe the North American Commission on the Environment is essential to assure that the NAFTA's environmental provisions will be implemented effectively."

The U.S. government's support for NWF's specific recommendations for the Commission was confirmed in a letter sent to Hair yesterday from U.S. Trade Representative Carla A. Hills.

In its announcement, the largest conservation organization in the United States made clear that its support extends only to the agreement's environmental provisions and should not be misinterpreted as a green light for the whole of NAFTA. Further, NWF urged the next Congress to carefully consider the evolution of the environmental commission as details are negotiated, the language crafted for legislation implementing NAFTA, and the treatment of funding issues related to trade and environment.

"Vigorous implementation of the agreement's environmental concepts will be crucial to accomplishing responsible free trade," Hair said. "Good intentions and the right ideas alone just aren't enough."

For the past two years, NWF has played a lead role in establishing an agenda for NAFTA environmental considerations. In addition to the Federation's work with the U.S. Trade Representative's (USTR) office and the Environmental Protection Agency (EPA), Hair was appointed to serve on the Investment Policy Advisory Committee to the USTR.

"A key factor in these negotiations has been Ambassador Hills' and EPA Administrator Reilly's ability to advance trade-related environmental concerns beyond the status quo. Together with their proficient staffs, they have engaged these important issues in a forthright and professional manner. They are to be commended for their excellent efforts," Hair said. "These important environmental provisions represent a first step in achieving the goals of sustainable development as articulated at the Earth Summit in Rio last June."

The Federation's affirmative support of these provisions does not extend to aspects of the NAFTA other than those related to the environment, nor does it extend to other actions taken by the Administration on environmental issues.

The National Wildlife Federation is the nation's largest conservation organization. Founded in 1936, the Federation, its 5.3 million members and supporters, and 51 affiliated organizations work to educate individuals and organizations to conserve natural resources, to protect the environment, and to build a globally sustainable future.

September 16, 1992

Draft Outline For Trilateral Environment Commission

The United States, Mexico and Canada agree to establish a North American Commission on the Environment consisting of governmental representatives of each of the three countries.

I. PURPOSE. The Commission provides:

- A. A forum for the discussion of environmental issues;
- B. A means of encouraging and supporting cooperation on environmental matters and solutions to environmental problems; and
- C. A mechanism for coordinating environmental expertise and information.

II. FUNCTIONS. The Commission's functions include:

- A. Facilitating effective implementation of NAFTA environmental provisions:
 - Serving as an inquiry point concerning NAFTA environmental disputes and consultations;
 - Making available environmental expertise to NAFTA dispute settlement panels; and
 - Reviewing the extent to which NAFTA Parties have achieved the environmental objectives of the NAFTA, including through receiving and reviewing relevant information from non-governmental organizations and private citizens.
- B. Providing information on environmental protection activities of the three countries:
 - Preparing a public, annual report on environmental issues of concern to all three countries;
 - Including in the report, as appropriate, elements such as:
 - review of the progress made by the NAFTA Parties in strengthening the development and enforcement of their environmental laws and regulations;
 - review of administrative and judicial actions taken by each NAFTA Party to enforce its environmental laws;
 - recommendations to the NAFTA Parties related to the environment, including, if appropriate, with respect to the avoidance of "pollution havens";
 - summary of the NAFTA Parties' implementation of international environmental agreements to which the three countries are party; and

- any other relevant information the Commission deems appropriate.

- C. Promoting cooperative environmental problem-solving:
 - Identifying environmental concerns that are best addressed by cooperative action and, as appropriate, developing plans to address such concerns and following up on the implementation of these plans;
 - Coordinating programs for sharing technical expertise to address NAFTA-related environmental issues, with a view to minimizing duplication;
 - Identifying and discussing other ways of strengthening environmental cooperation among the NAFTA Parties; and
 - Providing a forum for the sharing of experiences in one country related to environmental issues that might be of interest to other NAFTA Parties;
- D. Ensuring effective public participation:
 - Holding annual meetings, including sessions open to the public;
 - Establishing appropriate channels for written submission by the public, including by any non-governmental organization; and
 - Providing that each NAFTA Party could establish public advisory committees, in accordance with its domestic laws, to advise their representatives on the Commission (these public advisory committees could include representatives from citizen groups, environmental organizations, state and local authorities, industry associations, labor unions, and academic institutions).

III. OPERATING PROCEDURES

The Commission would operate by consensus. In addition to its annual meetings, it would meet at the request of any of the NAFTA Parties to address a particular environmental issue of concern to the Parties, or, upon agreement of the Commission, to discuss matters brought to its attention by the public when circumstances warrant.

**The United States Trade Representative
Executive Office of the President
Washington, D.C. 20506**

Mr. Jay Hair
President
National Wildlife Federation
1400 Sixteenth Street, NW
Washington, DC 20036-2266

Dear Jay:

During our last meeting on September 9, we discussed the establishment of a North American Commission on the Environment. The National Wildlife Federation and some of the other environmental non-government organizations with which I have consulted believe that such a commission could bolster the objectives and strong environmental provisions of the proposed North American Free Trade Agreement. I agreed with you. After our meeting, I discussed the issue in depth with EPA Administrator Reilly and other interested Administration officials.

The Administration has pursued the question of establishing a North American Commission on the Environment with Mexico and Canada. At a meeting on September 17, Administrator Reilly discussed this initiative with his Canadian and Mexican counterparts. The three environmental ministers announced their agreement in principle to the creation of a commission at the conclusion of that meeting. Officials of the three governments are now working to bring this idea into reality.

The EPA Administrator and his counterparts would comprise the environmental commission, just as my counterparts and I will comprise the North American Free Trade Commission. I will be responsible for coordinating the U.S. government's handling of issues which come before the NAFTA trade commission. Bill Reilly will certainly be coordinating with the appropriate U.S. government agencies, including USTR, as the environmental commission addresses problems of broad environmental concern.

The Department of State, along with EPA and USTR officials, will assume responsibility for negotiating the creation of a North American Commission on the Environment with Mexico and Canada. The outcome of negotiations will of course determine the final shape of the commission, but we have already shared with Mexico and Canada the same draft outline which we sent Lynn Greenwalt on September 15. This paper continues to be the basis of discussion within the Administration as we prepare for negotiations.

As you and other environmentalists proposed, we envision a three-fold purpose for the environmental commission:

- to provide a forum for the discussion of environmental issues of concern to the three environmental ministers;
- to help encourage and support cooperation on environmental matters and solutions to environmental problems; and
- to help coordinate environmental expertise and information.

The commission's functions would include facilitating effective implementation of NAFTA environmental provisions, providing information on environmental protection activities of the three countries, promoting cooperative environmental problem-solving, and ensuring effective public participation. The environmental commission would offer innovative solutions to address the complex relationship of trade and environmental problems.

Jay, I trust that the Administration's efforts to create a North American Commission on the Environment significantly address the remaining concerns hampering National Wildlife Federation's full-fledged support for the North American Free Trade Agreement. As you know, with the help of you and our other environmental trade advisors, our negotiators made unprecedented progress in addressing environmental issues in the talks leading to conclusion of the NAFTA. In the end, as you have remarked, NAFTA represents a truly remarkable contribution to our goal of promoting sustainable development in North America. I look forward to your vocal support for NAFTA, and the support of your colleagues in the environmental community, in the coming days.

Sincerely,



Carla A. Hills

APPENDIX D

Environment and the NAFTA Negotiations

Workshop on NAFTA & NACE

Ottawa, Dec. 7, 1992

Robert Page, NRTEE and Faculty of Environmental Design, University of Calgary

PROCESS ISSUES:

- 1) During FTA negotiations no consideration of Environmental Issues. Political criticism of the government.
- 2) Development of the EARP legislation - expanded scope to cover environmental review of policy and programs - NAFTA one of the first to come under provision.
- 3) Options of an:
 - (A) Independent "Open" Process (closer to EPA)
 - (B) In house confidential advisory process interacting with the negotiators

Strong departmental opposition to open assessment process which would create precedent for all other Policy Reviews.

- 4) Environmental Reps to SAGITS and ITAC (Major Consultative Bodies?)
 - CEAC to play co-ordinating role
 - Level of outside involvement uncertain
 - Confusion between "informing" and "public consultation"
- 5) Weaknesses would be handled by the "Parallel Process" also undefined.
- 6) Interdepartmental Environmental Review Committee struck with representatives from DEAIT, EMR, DOE, DOF, F&O, Forestry, IST and DOT-supported by a technical advisory committee from Environment Canada.
- 7) Review Committee had two basic tasks -
 - (A) to advise the negotiating teams on the environmental implications of the various options open to them
 - (B) to document the effects on Canada of the final NAFTA agreement.
- 8) Initially, only a summary of their report to be released but later changed due to NGO pressure to release the full document.
- 9) Stakeholder consultations expanded after NGO pressure but still limited. Document viewed as confidential cabinet document.
- 10) Delays in the negotiations allowed the document to be expanded as a result of scientific and NGO input.

ISSUES WHICH TRIGGERED CONTROVERSY IN NAFTA NEGOTIATIONS

- 1) Some NGOs fundamentally distrusted the concept of free trade which they believed would lead to decreased environmental regulation and protection.
- 2) **Extraterritoriality.** Government opposed to the unilateral application of extraterritorial measure which some NGOs saw as essential to keep in reserve when normal diplomatic measures fail.
- 3) **Sustainable Development.** How was it to be entrenched in NAFTA.
- 4) Relationship to other **Multilateral Environmental Conventions** and agreements such as CITES.
- 5) Environmental Exemptions from normal international trade provisions of the GATT.
- 6) Environmental Standards - Harmonization up or harmonization down?
- 7) Environmental Enforcement - significant area of concern to many North American NGOs.
- 8) Dispute Settlement Mechanism - a political or a scientific process in dealing with environmental issues.
- 9) **Investment** - level playing field for environmental costs.
- 10) Public Information, Awareness and Accountability
- 11) **Subsidies** - critical environmental issue left over to GATT negotiations.
- 12) **Environmental Scope** of the Review - document more limited than EPA but much more than originally intended by Government.
- 13) Long Range Transport of Airborne Pollutants.
- 14) **Water Exports** and future North American shortages.
- 15) Wildlife Habitat and Protected Spaces - migratory species moving between the three countries.
- 16) Migration of Polluting Industries - Are there sufficient economic incentives?

Conclusions:

Given the above there is a fundamental need for NACE to address trade and the wider issues involved in the Environment.

APPENDIX E

**Statement of Kathryn S. Fuller,
President, World Wildlife Fund**

to the

**Subcommittee On International Trade,
Committee On Finance
United States Senate**

September 16, 1992

Good morning, I am Kathryn Fuller, President of World Wildlife Fund. With over 1.2 million members in the United States, and affiliated offices in over 40 countries that combine policy work and field projects in over 100 countries, World Wildlife Fund is the world's largest private organization dedicated to conservation of nature.

I appreciate the opportunity to give WWF's reactions to the proposed North American Free Trade Agreement. Let me state at the outset that WWF recognizes that trade liberalization in general promises to help developing countries improve their economies, thereby enabling them to devote more resources to conservation and environmental protection. For us the key question is whether steps toward trade liberalization incorporate adequate environmental safeguards--either within trade agreements themselves or in tandem.

We believe that while the NAFTA text before you includes important provisions aimed at enforcement of environmental laws and standards, it has not adequately addressed the broader environmental ramifications of liberalized trade--that is, the extent to which shifts in capital and competitive advantage will alter patterns of natural resource use throughout the NAFTA region. Of particular concern to us is the apparent absence of a mechanism for anticipating trade-driven changes in land use, and for mitigating the resultant impacts on biodiversity.

Thus, while WWF can endorse the NAFTA as a positive first step, we feel it essential that governments take a broader view of trade and environment, and commit to pursue additional needed environmental safeguards. Some of these issues can fairly be said to lie at a policy frontier, and could not have been settled by our negotiators. But it is equally certain that they must be addressed, if not in NAFTA itself then in a designated parallel process. Currently, however, we lack an adequate institution or forum to begin this important task, much less a clear expression by our governments of their intention to do so. Therefore, we urge:

- 1) The establishment of a North American Commission on Environment, involving all NAFTA parties, to provide a forum for addressing environmental issues, including those related to trade, and to promote sustainable development throughout the region;
- 2) That the Commission be charged with monitoring environmental impacts of liberalized trade in the NAFTA countries, with a mandate to prepare recommendations to the parties for mitigating adverse impacts where they appear, and

- 3) That the Commission be open to full participation by interested organizations, citizens, and expert bodies.

Mr. Chairman, the past two or three years have witnessed a growing, if somewhat belated, recognition that global trade policies and global environmental health are inextricably linked—a recognition that has led to an important rapprochement between trade specialists and environmental advocates, whose world views and even language are often vastly different. World Wildlife Fund's own work on trade issues is now several years old, and was strengthened last year when the U.S. Trade Representative's office invited our founder and current board chairman, Russell E. Train, to become a member of the Advisory Committee on Trade Policy and Negotiations.

From the earliest days of the NAFTA discussions, it has been said that Congressional acceptance of the agreement would depend in no small degree upon its environmental impact. We are greatly encouraged by this public Congressional recognition of the trade-environment linkage. Yet, as our World Resources Institute colleague Jessica Matthews wrote several months ago, in *The Washington Post*, the connection between trade and environment is a tangled knot, whose strands go every which way, and, indeed, often conflict. Because of this complex net of relationships, the truth is that, while predictions can be made about the NAFTA's effect on certain environmentally sensitive sectors, its overall environmental consequence simply cannot be stated with confidence at this time.

As each of you is aware, there has already been substantial public discussion of such important environmental aspects of the NAFTA as its safeguards for U.S. sanitary and phytosanitary standards, the structure of its dispute resolution process, and the possibility that the NAFTA will cause increased pollution because of relatively weak enforcement of Mexican laws and regulations. I know that you, Chairman Baucus, have taken a strong interest in these issues, and I hope and expect that my colleagues will address these aspects here today. Yet, these concerns are not only part of the complex trade/environment relationship NAFTA would affect. Today I want to direct my remarks to two other areas: 1) NAFTA's relationship to poverty and sustainable development; and 2) NAFTA's potential adverse impact on Mexico's tropical forests and biodiversity. I conclude with our recommendations for steps to ensure that a strong parallel process is established to deal with the important environmental issues NAFTA has not addressed.

I. Poverty, sustainable development, and the need to internalize environmental costs

Last year, I participated in a group of environment, business, and government leaders, including Senator Chafee, from twelve countries in our hemisphere organized under the auspices of the World Resources Institute to prepare a far-reaching policy document called *Compact for a New World*. As part of this process leading up to the *Compact's* policy recommendations, we studied the current economic reality in the Western Hemisphere. Let me quote briefly from our findings:

Poverty and hunger are growing throughout the hemisphere, forcing people to despoil the environment in their struggle to survive....[T]here were at least 204 million poor people in Latin America and the Caribbean in 1990...The official figures for the United States and Canada add another 38 million...Real per capita income for Latin America as a whole fell by almost 1 percent a year from 1981 through 1990...Wages have deteriorated badly, by 50 percent or more in some places. Income disparities in the hemisphere are among the world's highest, posing threats to political and social stability in some

places...The most vulnerable groups, women and children, suffer the most from poverty throughout the hemisphere...In Latin America and the Caribbean, 44 percent of the labour force is unemployed or eking out a substandard living...The quality of housing, health care, and education grows steadily worse...Most of our countries are deeply in debt, and the need to service it keeps budget deficits high, fuels inflation, saps investor confidence, and ... distorts economies.

This scale of poverty in our hemisphere is simply not acceptable, and no responsible environmentalist or policymaker can ignore it. We must find economic resources to work jointly to eliminate debilitating poverty. To that end, our final *Compact* document made eight interrelated policy recommendations, including lowering trade barriers and lifting investment restrictions. We noted, however, that while trade liberalization is necessary, by itself it is insufficient, and must be accompanied by several kinds of complementary measures to ensure that the benefits of growth are equitably distributed and sustainable in the long run.

Trade liberalization in general and the NAFTA in particular are vital as means to bring additional resources to bear on the problems of devastating poverty in our hemisphere. However, the NAFTA is not in and of itself sufficient to assure that the benefits of economic development will be equitably distributed or that economic development will not destroy the natural resources which make development and all of life possible.

It is a positive step that the negotiators agreed to include a reference to sustainable development in the preamble of the NAFTA text. "Sustainable development" must be more than symbolic, however. All three governments--the United States, Mexico, and Canada--must develop concrete plans both to institute policy reforms and to provide the necessary financial resources to make sustainable development not a slogan but a reality.

By making economic opportunities more widely available, the North American Free Trade Agreement promises to help raise the standard of living of people in Mexico, in the United States, and throughout the hemisphere, particularly where conditions are the most desperate. If the agreement can achieve this without causing significant offsetting harm to the environment, it has much to recommend it.

In dealing with environment, the NAFTA negotiators focused their attention primarily on protection and enforcement of environmental standards. Among their accomplishments: provisions requiring that strict standards be maintained and that signatories "harmonize upwards" so that equivalence is reached at the highest relative level of stringency. No signatory, moreover, may relax environmental standards to attract investment. And the parties are to cooperate to ensure effective and more uniform enforcement.

What these provisions and assurances have in common is a recognition that where a legal standard requires care and expense to protect the environment, a producer or manufacturer unanswerable to that standard, or that evades it, enjoys an unfair competitive advantage. Put another way, the ability to pass on "environmental costs" in reality operates as a hidden subsidy.

Much of the environmental damage in this hemisphere--and the rest of the world--comes from the fact that many environmental goods and services lie outside our current market system. They are so-called "public goods" that, however valuable to us they may be, do not carry a price. As a result, they are frequently over-utilized and under-protected, often with profound and adverse social consequences. For so-called "externalized" environmental

values, the highly-touted miracle of the market place fails us. The need to find ways to bring environmental values into the market system is a matter of urgency both in the environmental community and for society in general.

Environmental externalities—hidden environmental costs not reflected in the market price of goods and services—are a trade distortion that NAFTA must work to eliminate. A trade regime that does otherwise in effect confers a competitive advantage on those who do the least to protect the environment, and risks becoming an instrument that works against sustainable development. I emphasize here that I am not speaking simply of pollution, the transborder area, practices in Mexico, or of the frequently expressed fears that countries to the south will evolve into pollution havens: What I am speaking of extends to agriculture, forestry, and the entire range of land-use and resource consumption patterns, throughout the NAFTA region. Let us consider for a moment the case of tropical forests.

II. Tropical Forests and Biodiversity

Policymakers increasingly acknowledge the importance of tropical forests to the future of our planet. What many do not recognize is that Mexico contains an incredible variety of habitats ranging from vast deserts and snow-covered mountain peaks to mangroves, coral reefs, and over 11.5 million hectares of lush tropical forest. Mexico's terrestrial vertebrates include more endemic species than any other country in the hemisphere, and its flora are among the world's most strikingly diverse. It ranks among the five largest national repositories of biological diversity on Earth.

As in many developing countries, however, these natural assets are rapidly disappearing or seriously threatened as a result of population expansion and inappropriate development schemes. If present land use trends continue, by the end of this century, Mexico will have lost more than half of its 80 million hectares of natural ecosystems. While government policies under the Salinas administration are now beginning to address massive deforestation, reconciling the twin goals of economic growth with environmental protection is a slow process. The contrary financial incentives are powerful, especially where valuable natural resources are concerned.

The reduction or elimination of tariffs may well exacerbate these land conversion trends. Incipient community forestry industries seeking to maintain the forest cover while deriving economic benefits for local communities could be jeopardized by intrusion of cheaper wood products from the US or Canada. Such a boost for the timber industry in the southeast US should not be counted as a NAFTA benefit if as a consequence sustainable forestry in the Yucatan peninsula is replaced by orange groves and cattle farming.

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Similarly, Mexico's apparent advantages in the production of citrus fruits and lean beef must not discount the cost of deforestation. A reduction in the price of frozen orange juice or hamburger beef in the American supermarket should not be regarded as a benefit derived from NAFTA if the production of those items is subsidized by loss of biodiversity and the local and global ecological services that tropical forests provide.

A careful examination of the production of timber, cattle, and citrus in North America underscores the risk that liberalized trade could accelerate destruction of Mexico's tropical forests. The NAFTA parties should commit themselves now to addressing this risk. In particular, they should seek ways to assure that the prices of all products traded accurately reflect their true environmental costs. The prices of beef, oranges, or old growth timber must

reflect the costs of deforestation, so as markets open, sustainable forest management can compete on a more nearly level playing field.

CONCLUSION AND RECOMMENDATIONS

Where businesses have undertaken extra expense and effort to protect the environment, as in the case of Mexico secondary forest management, it is essential that they not be put out of business by foreign enterprises that undertake no such measures. And where a change in tariff schedules carries with it the potential to precipitate major shifts in land use, it is essential that the costs to habitat, watersheds, and biodiversity be figured into the accounting.

For all its concentration on protection of environmental standards, the NAFTA text fails to tackle this most central task. Perhaps this is unsurprising. As a frontier in policy, finding ways to protect the environment through the market is an exceedingly complex, even daunting undertaking. There are and will be honest disagreements about how to go about it. But there is no question that we must begin.

Two good places for NAFTA to make a start would be to acknowledge more explicitly that patterns of international trade have profound implications for the environment and for sustainable development. NAFTA's preambular language resolving to reduce distortions to trade should expressly include environmentally linked distortions. And the goal of promoting sustainable development deserves a place in the treaty's objectives section.

More important than drafting placement and emphasis, however, is the need to provide some institutional framework for addressing these questions. WWF has long urged our negotiators to establish a tripartite Commission on Environment to begin looking at environmental issues. The Commission could play a valuable role monitoring the effects of liberalized trade on the environment, throughout the NAFTA region, and could develop policies and make recommendations to the parties on trade and other measures needed to minimize environmental impacts.

If the Commission conducts its work with full participation of the public, it could make a significant contribution to the environmental future of our hemisphere. We note with regret that the most that has currently been agreed to in this regard is a bilateral commission to look at pollution in the transborder area—without the Canadians at the table. Issues beyond pollution, particularly those having the greatest potential to impact biodiversity, will go unaddressed.

